HEALTH REVIEW COMMISSION

MARCH 1986
Volume 8
No. 3

DECISIONS

COMMISSION DECISIONS

March 4, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	Docket Nos. LAKE 82-93-R
	:	LAKE 82-94-R
UNITED MINE WORKERS OF AMERICA (UMWA)	:	LAKE 82-95-R
v.	:	
SOUTHERN OHIO COAL COMPANY	:	

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the issue is whether miner representatives who participated in post-inspection conferences held on mine property pursuant to 30 C.F.R. § 100.6(a) are entitled to compensation under section 103(f) of the Mine Act (30 U.S.C. § 813(f)) for the time spent in the conferences. A Commission administrative law judge held that section 103(f) of the Act authorizes payment of compensation to a miner representative for time spent participating in post-inspection conferences conducted at a mine immediately or shortly after the completion of a physical inspection of the mine. 5 FMSHRC 729, 759 (April 1983)(ALJ). However, finding that the particular conferences in issue were not the kind of post-inspection conferences compensable under section 103(f), the judge granted the operator's notices of contest and vacated three citations charging violations of section 103(f). 5 FMSHRC at 759-63. We agree with the judge that in appropriate instances post-inspection conferences at mines are compensable under section 103(f) of

involves a similar conference held on May 24 and 26, 1982, at SOCCO's Raccoon No. 3 mine.

All of the conferences at issue stemmed from MSHA's adoption on May 1, 1982, of revised civil penalty regulations (47 Fed. Reg. 22,286, 22,294-22,297 (1982)), codified at 30 C.F.R. Part 100. Among these regulations is section 100.6(a), which states:

> All parties shall be afforded the opportunity to review with MSHA each citation and order issued during an inspection.

In publishing these regulations, MSHA indicated that all outstanding citations and orders that had not been reviewed for penalty proposal purposes under MSHA's prior rules by May 21, 1982, would be governed by the new procedures. 47 Fed. Reg. 22,286. The three conferences at issue were held pursuant to this policy as section 100.6(a) reviews and, in fact, were among the first conducted under the authority of that provision.

Twenty citations were reviewed at the two conferences held at Socco's Meigs No. 2 mine on May 24, 1982. The citations had been issued during a regular quarterly inspection at the mine between March 3 and May 15, 1982. The first conference, held from approximately 9:00 a.m. to 12:00 noon, covered 14 of the citations. This meeting was conducted by MSHA inspector Dalton McNece and was attended by Carl Curry, a SOCCO safety supervisor, and Robert Koons, a miner representative. In general, the participants discussed the facts surrounding the alleged violations. The discussion included such topics as the seriousness of the violations, the operator's negligence, and the good faith of the efforts to abate the violations. As a result of the conference, the designation of two of the violations as "significant and substantial" violations was deleted. See 30 U.S.C. § 814(d)(1).

The second conference, held from approximately 2:00 to 2:30 p.m., was conducted by MSHA inspector Myron Beck. Mr. Curry and miners' representative Frank Goble attended this meeting. The remaining six citations were discussed. The content of the afternoon conference was substantially the same as that of the morning meeting. Inspector McNece testified that the time spent in these conferences was unusually long because of the parties' unfamiliarity with the new Part 100 procedures. He estimated that current section 100.6(a) conferences last from five to 45 minutes, depending on the number of citations involved. SOCCO

n inspector during the physical inspection of a mine, to participate in pre- or post-inspection conferences held at the mine, and to be compensate for the time spent in accompanying the inspector during the mine inspectio 5 FMSHRC at 751. Because section 103(f) does not specifically mandate ompensation during the time spent participating in pre- or post-inspectio conferences, the judge questioned whether Congress intended that the iner representative be compensated for time spent in conferences or meetings held at the mine after the physical inspection of the mine is completed. After examining the legislative history of section 103(f),

1/ Section 103(f), 30 U.S.C. § 813(f), states:

> Subject to reguiations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this aection, for the purpose of aiding such inspection and to participate in pre -or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jursidictional prerequisite to the enforcement of any provisions of this Act.

[Emphasis added]

not defined in the Mine Act or in the Secretary's regulations, the judge, looking to the legislative history, described a post-inspection conference as an interchange between an inspector and members of an inspection party, occurring immediately after a physical inspection of a mine, and involving a discussion of the inspector's rationale for issuing a citation or order, his fixing of an abatement time and other safety and health matters related to the inspection. 5 FMSHRC at 757. The judge concluded that Congress desired the miner representative to be able to fully participate in and to be compensated for pre- and post-inspection conferences so that the representative could make a meaningful contribution to the safety and health of miners by being afforded an opportunity to address safety and health concerns resulting from the inspection, when the facts and circumstances of the inspection are fresh and when the parties to the conference can explore ways to correct the conditions and achieve prompt abatement. 5 FMSHRC at 759, 762. The judge found, however, that the subject conferences had no meaningful effect on safety and health because they occurred long after the completion of the inspections and abatement of the violations, and because the miner representatives who participated in the conferences were not present during the inspections. Consequently, the judge concluded that the conference accomplished nothing more than affording the operator an opportunity to take advantage of the Secretary's Part 100 penalty assessment procedures and were not compensable conferences. 5 FMSHRC at 762-63.

We agree that section 103(f) of the Mine Act requires that a miner representative be compensated for participation in pre- or post-inspection conferences. As the judge noted, section 103(f) clearly mandates that a miner representative be afforded the opportunity to accompany an inspector during the physical inspection of the mine, and to participate in pre- or post-inspection conferences held at the mine. Section 103(f) further provides that the miner representative "shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." While section 103(f) does not expressly mention compensation for pre- or post-inspection conferences, the legislative history of the Act clearly indicates Congress' intent that section 103(f) require such compensation.

The report of the Senate Committee which largely drafted much of the 1977 Mine Act states the purpose of the provision for miner participation and compensation contained in section 103(f). In addition to discussing the rights of the miner representative to accompany an inspector during an inspection, the report states:

> To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

S. Rep. No. 181, 95th Cong., 1st Sess. at 28-29 (1977), reprinted Senate Subcommittee on Labor, Committee on Human Resources, 95th C 2d Sess., Legislative History of the Federal Mine Safety and Healt of 1977, at 616-17 (1978) ("Legis. Hist.")(emphasis added). The C ference Report likewise states that a miner representative is to b paid by the operator "for his participation in inspections and con Legis. Hist. at 1323. Further, the matter was discussed on the fl the House during the oral report to the House by the conference co During this oral report both Congressman Perkins and Congressman G stated that the bill authorized miner representative participation compensation for pre- and post-inspection conferences. Legis. His 1357, 1361.

With the intent of Congress so clear, we agree with the judge section 103(f) requires compensation for a miner representative wh participates in "pre- or post-inspection conferences" held at the We do not agree, however, with the judge's further conclusion that compensable a post-inspection conference must be held immediately shortly after the completion of the physical inspection of a mine. need not in this opinion set forth all of the contours for compens post-inspection conferences. While we agree that for greater effe ness and orderly process, a post-inspection conference should ordi take place within a reasonably immediate time frame after completi the physical inspection of a mine, circumstances may exist which l legitimate postponement or delay of the conference.

The judge further found that the conferences at issue were no compensable "assessment conferences", held pursuant to 30 C.F.R. § 100.6(a) and incident to MSHA's civil penalty assessment authori rather than compensable conferences held incident to the participa rights of the miner representative as set forth in section 103, an therefore that they were not compensable post-inspection conferenc 5 FMSHRC at 761. We disagree.

above, the purpose of the miner representatives' participation rights under section 103(f) is to "enable miners to understand the safety and health requirements of the Act and ... [to] enhance miner safety and health awareness." Legis. Hist. at 616. As Representative Gaydos stated, "... attendance at the closing conference enables miners to be apprised more fully of the inspection results." Legis. Hist. at 1361. Thus, the pertinent inquiry is whether the substance of the poat-inspection conference advanced these goals.

The record establishes that at the post-inspection conferences at issue the inspectors reviewed each citation, explained the reasons for its issuance, and discussed the findings made in conjunction with the citation such as "gravity", "negligence", "good faith abatement" (sect 110(i)) and whether the violation was "significant and substantial" (section 104(d)(1)). The representatives of the operator and of the miners had the opportunity to present their views on the asserted violations and the inspectors' findings. The inspectors, in turn, had the opportunity to modify the findings in response to the discussions. In fact, as a result of these discussions, the inspectors deleted two the "significant and substantial" findings.

We conclude that the subject matter of these post-inspection conferences directly related to the enforcement of the Mine Act throug the inspection process, and thus to safety and health issues. We real that the discussions had another aspect in that the information exchan would be considered by MSHA's Assessment Office in determining the amount of penalties proposed for the violations pursuant to the criter and procedures set forth in 30 C.F.R. §§ 100.3 to 100.5. However, the inspection and assessment functions of the Mine Act are neither wholly discrete nor mutually exclusive. The participation of the miner representative in the post-inspection conferences and the resulting discussion of the violations could assist inspectors in carrying out their enforcement responsibilities and increase miner and operator awareness of the conditions which resulted in the cited violations. Even when the discussions centered on factors which would impact upon the penalty proposed for a violation, they served to enhance safety. discussion of the "gravity" of a violation or of the "significant and substantial" nature of a violation involves consideration of the hazar to miners created by the violation. A discussion of whether the opera was negligent involves consideration of the standard of care an operat must exercise in seeking to prevent violations and hazardous condition

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

We recognize that the judge particularly was troubled by the delay tween the inspections and the post-inspection conferences. 5 FMSHRC 755, 762. The delay here, however, was of a sui generis nature casioned hy the introduction and implementation of MSHA's new Part 100 ocedures. The judge was further troubled by the fact that the four six miner representatives and the five management representatives who companied the inspectors at various times during the inspections were t present at the conferences. 5 FMSHRC at 755, 762. This fact is not fficient to change the compensable character of the conferences. Many nes are so large that numerous miner representatives accompany an spector or inspectors during an inspection, and even when post-inspection nferences are held close in time to the inspection, these aame miner presentatives may he unavailable to participate in the conferences.

Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we

Anna L. Wolgast
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

Mary Lu Jordan
United Mine Workers of America
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Administrative Law Judge George A. Koutras
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2)(1982). The complaint alleges that Consolidation Coal Company ("Consol") unlawfully suspended the complainants for refusing to operate heavy mobile equipment at speeds which they considered to be unsafe. Consol maintains that the complainants were disciplined lawfully for operating their equipment too slowly. Following a hearing on the merits, a Commission administrative law judge dismissed the Secretary's complaint. 6 FMSHRC 1740 (July 1984)(ALJ). For the reasons stated below, we affirm the judge's decision in result.

On April 12, 1982, the complainants returned to Consol's Reclamation Services No. 60 Mine in Ohio to work as pan operators following a three-month layoff occasioned by a lack of reclamation work. 1/ Several days later, on April 15, 1982, complainants Sedgmer and Corlock were part of a pan crew operating their equipment in a loading and dumping cycle.

1/ A pan, also called a scraper, is a 95,000-pound vehicle used to scrape earth and haul it to another location.

told him that they were going as fast as prevailing
permit. Following his exchange with Taylor, Gorlock asked an
of the Department of Labor's Mine Safety and Health Administra
("MSHA"), who was at the site, how fast he should operate his
inspector responded that each equipment operator must judge pr
operating speed based upon the conditions he encounters and th
capabilities of his equipment. Complainant Biega was not at w
day.

Not satisfied with the equipment operators' pace of produ
Taylor asked Thomas Cyrus, a company reclamation supervisor, t
a time-motion study. The time-motion study devised was to inv
"deadhead" operation, that is, driving empty pans from one rec
area to another. Neither the pan operators nor their foreman
know that the study was being conducted. The deadhead operat
scheduled for Friday, April 23, 1982. The regular pan crew wa
that morning by bulldozer operators and mechanics. Foreman Bu
list prepared by Superintendent Taylor to assign operators to
pans. The first four pans were assigned to bulldozer operato
mechanics. The next five pans were assigned to regular pan op
The last four pans were assigned to the complainants and John
mechanic.

The time-motion study covered almost the entire route of
ment relocation. No times were recorded for approximately the
mile of the run in order to permit the operators to bring the
to operating speed. The total distance considered in the time
study amounted to approximately 9.7 miles. The results of th
motion study showed that the fastest operator completed the r
minutes. The slowest operator in the first nine pans complet
in 40 minutes. Complainant Biega took 55 minutes to finish,
complainants Gorlock and Sedgmer took 74 minutes and 76 minut
respectively, to complete the run. 2/

Upon completion of the deadhead operation, the complaina
flagged over to the side of the road. Taylor asked each of t
two questions: whether there was anything mechanically wrong
pan and whether there was anything unsafe about his pan. All
the complainants responded in the negative. Taylor then told
plainants to remain in their pans. They did so until the end
shift, a period of about six hours. At that time, they were
report to Taylor's office at 7:00 a.m. on Monday, April 26, 1

collective bargaining agreement between Consol and the UMWA, appealed the disciplinary action taken against them. The arbitrator who heard the case concluded that the complainants had engaged in a slowdown, but that their actions did not warrant dismissal. Instead, the complainants each received a 30-day suspension without pay or benefits.

Following the arbitrator's decision, the Secretary filed a complain under the Mine Act on behalf of Sedgmer, Biega, and Gorlock. In his decision, after a hearing on the complaint, the Commission administrativ law judge found that during the deadhead run the complainants had taken a "leisurely trip" relying on the belief that only equipment operators rightfully can determine the speed at which they will operate their equipment. 6 FMSHRC at 1744. As a matter of law under the relevant mandatory safety standard, the judge held that the speed at which a pan may be operated properly and safely is not within the sole discretion of the pan operator. 6 FMSHRC at 1745. 3/ The judge indicated that the question of the complainants' good faith belief in a safety hazard was not a controlling factor in this discrimination proceeding. Id. Accord to the judge, the crucial question was whether Consol, in taking discipl nary action against the complainants, held a good faith belief that the complainants were engaged in a slowdown. Id. The judge found that the results of the time-motion study justified Consol's belief in this regard. Id. Notwithstanding his statements regarding the relevancy of the complainants' belief in a safety hazard, the judge examined the testimony regarding the dust and traffic conditions which the complainants alleged created a hazard. He found that the road conditions encountered by all the operators were approximately the same and not so severe as to justify abnormally slow speeds. 6 FMSHRC at 1743-46. The judge decided the case in Consol's favor and dismissed the Secretary's complaint. 6 FMSHRC at 1746.

On review, the Secretary of Labor challenges the judge's decision on the grounds that it fails to comply with Commission Procedural Rule

3/ 30 C.F.R. § 77.1607(c) provides:

> Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and type of equipment used.

(April 1984), aff'd sub nom. Gravely v. Ranger Fuel Corp. and FMSHRC, No. 84-1511 (4th Cir. May 24, 1985), with The Anaconda Co., 3 FMSHRC 299 (February 1981).

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other ground sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it neverth less may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defens Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant.

4/ Rule 65(a) provides in pertinent part:

> Form and content of judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. ...

29 C.F.R. § 2700.65(a).

229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). See also Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982). The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work. See, e.g., Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397 (June 1984). However, the facts of the present case do not reveal an unambiguous refusal to work. Rather, the claim is advanced that the miners chose to perform work in what they believed to be a safe manner, although it was contrary to the manner of operation envisioned by the operator. In Sammons, supra, the Commission indicated that, in appropriate cases, such activity could enjoy the protection of the Act, but that the involved miner must still hold a reasonable, good faith belief in the existence of a hazard, and ordinarily should communicate, or at least attempt to communicate, to the operator his belief in that hazard's existence. Sammons, 6 FMSHRC at 1397-98. We also made clear that "a difference of opinion -- not pertaining to safety considerations over the proper way to perform [a] task" would lie outside the ambit of statutory protection. Sammons, 6 FMSHRC at 1398.

Thus, the initial issue is whether the complainants' conduct in driving the pans at a speed determined by the mine operator to be unacceptably slow, was predicated on a reasonable, good faith belief that to operate their equipment at a faster speed would have been unsafe. Central to this inquiry are the perceptions of the complainants that prevailing road conditions on April 23, 1982, justified, on safety grounds, their comparatively slow speed of operation. 5/

5/ The judge stated that the complainants' belief in the existence of a hazard is not a "controlling factor" and that it is "the motivation of the employer that is crucial." 6 FMSHRC at 1745. If the judge intended to suggest that the miners' belief in a hazardous condition was legally irrelevant, he erred. Pasula, 2 FMSHRC at 2789-96; Robinette, 3 FMSHRC at 807-12.

order to reduce the generation of more dust along the route. All three disclaimed any intent to work slowly in order to preserve work for themselves.

In evaluating the complainants' testimony, the judge found that they had not engaged in a deliberate slowdown designed to hamper Consol's operation and to avoid layoff. 6 FMSHRC at 1744. This language may be read as suggesting that the complainants acted in good faith. Assuming that they held a good faith belief, it is still necessary to establish the separate and conjunctive element that the belief was reasonable. See Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC at 993, 997 (June 1983). Concerning the miners' reasonable belief -- the issue on which we conclude that this case turns -- the judge analyzed and weighed the pertinent evidence and found that the miners' "leisurely trip" lacked a reasonable basis in safety-related concerns. As discussed below, we agree with the judge's disposition of this issue and find it supported by substantial evidence and grounded in credibility resolutions that the judge was best positioned to make.

The judge noted the existence of conflicting testimony regarding the road conditions encountered by the pan operators during the deadhead operation. 6 FMSHRC at 1743-44. Contrary to the testimony of the complainants, four of the operators in the main group of pans testified that dust was not a problem for them. Superintendent Taylor and the other management personnel, who traversed the deadhead route several times observing the pan operators' progress, testified that dust, traffic and road surface conditions were not significantly different for any of the pan operators. 6 FMSHRC at 1744. The judge found expressly that the road conditions encountered during the deadhead were no more dusty for the complainants than they were for the other members of the pan crew, and that the complainants were not held up by other traffic. 6 FMSHRC at 1744, 1746. In this regard, the judge stated that "there [was] no evidence of a traumatic change in the road conditions" between the beginning and the end of the test. 6 FMSHRC at 1744. He concluded, "I do not find that such extremely dusty conditions existed, and I cannot find that the time and motion study was unfair." 6 FMSHRC at 1746. In reaching these factual findings, it is apparent that the judge credited the relevant testimony of the operator's witnesses and discounted the complainants' claims of unsafe road conditions. The judge's factual findings, which in part turn on credibility, are supported by substantial evidence and must be upheld. In reaching this conclusion we also rely on the testimony by the MSHA inspector that the overall safety consciousness of the operator was very good, that the haulage road was

exception of Sedgmer, whose testimony that he raised safety concerns prior to the deadhead run was disputed and not credited by the judge none of the complainants raised any safety concerns with Consol mana ment before, during, or after the deadhead operation. While such communications are not only expected, in ordinary course, in work re situations, their absence also lends weight to the conclusion that t disagreement here as to operating speed did not have a sound basis i safety concerns. Sammons, 6 FMSHRC at 1397-98.

We conclude that substantial evidence supports the judge's conclusion, whether express or implied, that the complainants failed to prove that their conduct was premised on a reasonable belief in the existence of a hazard. Thus, they failed to establish protected activity and a prima facie case. The Secretary's complaint was prop dismissed.

6/ We note that while 30 C.F.R. § 77.1607(c) necessarily delegates the equipment operator a certain degree of latitude in determining s operating speeds, this determination is not within his absolute disc Compliance with section 77.1607(c) must be judged on an objective, "reasonable person" basis, rather than on the basis of the subjectiv perceptions of each and every equipment operator. Cf. Great Western Electric Co., 5 FMSHRC 840, 841-43 (May 1983). Just as an MSHA inspector may determine that equipment is being operated at too fast speed, a determination can also be made by persons other than the equipment operator that the equipment is being driven slower than conditions warrant.

Richard V. Backley, Commissi

James A. Lastowka, Commissio

L. Clair Nelson, Commissione

7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 82
have been designated as a panel of three members to exercise the
of the Com ission

Office of the Solicitor
U.S. Department of Labor
015 Wilson Blvd.
Arlington, Virginia 22203

	:	
v.	:	Docket No. KENT 83-155-
	:	
KENTA ENERCY, INC.	:	
	:	
and	:	
	:	
ROY DAN JACKSON	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This matter presently is pending on review before the Comm
On January 31, 1986, the Commission issued an order directing,
that complainant Robert Simpson's Motion to Reopen the proceedi
pursue successorship issues be held in abeyance pending the Com
resolution of the underlying question of liability for violatio
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et
(1982). On February 10, 1986, Simpson filed a Petition for Rec
of that aspect of the Commission's January 31 order. Previousl
oral argument on the merits of this case was heard before the C
on February 26, 1986.

We confirm our January 31 order. We conclude that it is a
to resolve first the issue of liability presented to ua on revi
directing any proceedings dealing with successorship issues. A
Simpson's Petition for Reconsideration is denied. The merits o
case as well as Simpson's Motion to Reopen stand submitted. 1/

Richard V. Backley, Commiss

Joyce A. Doyle, Commissione

James A. Lastowka, Commissi

David T. Smorodin, Esq.
Steven D. Cundra, Esq.
Thompson, Hine & Flory
1920 N Street, N.W.
Washington, D.C. 20036

Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 84-49
UNITED STATES STEEL MINING COMPANY, INC.	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine and involves two alleged violations of a roof control standard f underground coal mines, 30 C.F.R. 75.200 (1985). 1/ The adminis

1/ The cited standard provides in pertinent part:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuous basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such sys The roof and ribs of all active underground roadways, trave and working places shall be supported or otherwise control adequately to protect persons from falls of the roof or rib A roof control plan and revisions thereof suitable to the conditions and mining system of each coal mine and approved the Secretary shall be adopted and set out in printed form The plan shall show the type of support and spacing approv by the Secretary. Such plan shall he reviewed periodically at least every 6 months by the Secretary, taking into consi tion any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last per support unless adequate temporary support is provided or

found that U.S. Steel violated its roof control plan by failing to install a temporary jack for roof support. For the following reasons, we reverse and remand on the negligence issue and affirm on the violati issue.

The alleged violations occurred at the Maple Creek No. 1 Mine, an underground coal mine owned and operated by U.S. Steel. Glen Ward and Nathan Klingensmith were district underground plan coordinators respons for setting spads and sight lines at U.S. Steel's mines. (Spads and sight lines insure that entries and crosscuts will be driven straight and at proper angles.) As underground plan coordinators they worked in different mines and different areas of a mine as needed and assigned.

On the morning of May 23, 1983, Ward and Klingensmith reported to Earl Walters, the acting mine foreman at the Maple Creek No. 1 mine for their daily work assignment. Walters testified that he and Ward discus the mining that had been done on previous shifts. They examined the mine maps to determine where spads would be needed that day. Walters testified that he specifically told Ward to set spads in No. 20 split a the intersection of the No. 7 room.

When the two miners arrived at the section of the mine that contai the intersection of No. 20 split and the No. 7 room the section foreman Walter Franczyk, was on the mine telephone conducting business. They greeted the section foreman, and they proceeded past him. For some unexplained reason, rather than going to the intersection of the No. 20 split and No. 7 room as directed by Walters, Ward and Klingensmith proceeded to the intersection of the No. 20 split and No. 6 room.

The No. 6 room was one of two working places on the section. At the start of the morning shift on May 23, the No. 6 room had already been mined and bolted up to, but not including, the intersection with the No. 20 split. Prior to commencing mining on the section and prior to the arrival on the section of Ward and Klingensmith, Franczyk had me with his section crew and had visited the intersection. The continuous mining machine operator and the operator's helper advised Franczyk that the roof in the intersection of No. 6 room and No. 20 split was drummy. 2/ Franczyk instructed them to cut the drummy roof down.

2/ The term "drummy" is defined as, "Loose coal or rock that produces a hollow, loose, open, weak, or dangerous sound when tapped with any hard substance to test condition of strata; said especially of a mine of . . ." A Dictionary of Mining, Mineral, and Related Terms

ten minutes installing two spads. He came out from under the unsu
roof, and Ward then proceeded under the unsupported roof and climb
onto the continuous mining machine to put more spads in the roof.
Klingensmith again went under unsupported roof and was preparing t
assist Ward when the roof collapsed on the miners. Ward and Kling
were killed. As a result of the accident, MSHA issued the two roo
control violations now before us on review.

In one of the citations, the Secretary first asserted that U.
Steel violated 30 C.F.R. § 75.200 when Ward and Klingensmith proce
beyond the last permanent support and under unsupported roof. U.S
Steel conceded the violation but argued that the violation was not
result of its negligence. 3/ The judge found otherwise. In doing
he relied on the testimony of MSHA Inspector Swarrow, one of two M
inspectors who investigated the accident, that the section foreman
responsible for the safety of everyone on his section. The judge
that the section foreman has the "authority and responsibility to
what happens on his section." The judge therefore concluded that
Franczyk was negligent "in not stopping the decedents to find out
destination and what they were going to do." 6 FMSHRC at 2696. F
that the section foreman's negligence was attributable to the opera
the judge found U.S. Steel negligent. We do not agree.

The Commission has held that when a violation is committed by
miner, the mine operator's negligence may be gauged by considering
forseeability of the miner's conduct, the risks involved, and the
supervision, training and disciplining of its employees to prevent
violations of the standard at issue. A.H. Smith Stone Co., 5 FMSH
(January 1983). All of the witnesses who testified in this proceed
agreed that the decision of Ward and Klingensmith to proceed beyond
last permanent roof supports and under unsupported roof was inexpli
and unforeseeable. Nor was any evidence offered by the Secretary
establish that U.S. Steel's selection or training of Ward and Kling
was in any way inadequate. To the contrary, the evidence clearly e
that Ward and Klingensmith were very experienced underground plan
who had received all required training concerning the hazards of wo
under unsupported roof and who, as far as is known, had never befor
performed their jobs under unsupported roof. Thus, there is nothir
the record from which to conclude that Ward and Klingensmith's own
of care is attributable to U.S. Steel under the imputation princip
discussed in A.H. Smith Stone.

3/ Section 110(i) of the Mine Act, 30 U.S.C. § 82 (i), requires

in finding negligence, the judge relied on the inspector's statement that a section foreman is responsible for the safety of everyone on his section. This ipso facto approach to a section foreman's negligence cannot be fully reconciled with the Commission's emphasis in Southern Ohio that the determinants of a section foreman's duty of care are the circumstances under which the violation arose.

The pertinent inquiry here is whether, under the circumstances described, section foreman Franczyk breached a duty of care toward Ward and Klingensmith. The record establishes that Ward and Klingensmith were employees who were not in Franczyk's chain of command. They were employees who worked in all of U.S. Steel's mines in the district and when they worked in the Maple Creek No. 1 mine, they were assigned as needed to different areas of the mine by the mine foreman. Nevertheless, Ward and Klingensmith were well known to Franczyk. Thus, when he saw them on his section he had every reason to assume what they were there to set spads, as directed by the mine foreman. This was not a situation in which unknown persons, with unknown responsibilities, were present in Franczyk's section.

Franczyk was on the telephone conducting mine business when Ward and Klingensmith arrived on his section, greeted him and proceeded past him. To his knowledge, Ward and Klingensmith had never installed spads under unsupported roof. Further, he had absolutely no basis to think that they would be installing spads in an area where the continuous miner operator and his helper were working to take down drummy roof. The inspector stated that the conditions in the intersection of the No. 20 split and No. 6 room were not in violation of the Mine Act. Drummy roof in a working place is not uncommon and to remove the danger posed, 30 C.F.R. § 75.200 requires the roof to be supported or adequately controlled. Franczyk was in the process of complying with this requirement; he ordered the continuous miner operator and his helper to take down the drummy roof. After the drummy roof was removed, required roof bolting would have commenced. While there might be conditions on a section so unusual and hazardous that a section foreman would be under a duty to warn everyone on the section of the existence of the hazards, here, given the obvious nature of the conditions and the expertise and experience of Ward and Klingensmith in working with mine roof, a warning to the two miners not to enter into an area of unsupported roof, and not to set spads until the roof had been supported, was not required and Franczyk's "failure" to give such warning does not constitute a lack of reasonable care. We conclude, therefore, that under these facts Franczyk was not negligent. 4/

Section 302(a) of the Mine Act, 30 U.S.C. § 862(a), and the ma
safety standard which implements section 302(a), 30 C.F.R. § 75.200
require the operator to adopt and the Secretary to approve a roof c
plan suitable to the conditions of the mine. Such plans are intend
be essentially negotiated agreements between the Secretary and the
operator regarding procedures to be followed by the operator in the
interest of miner safety and for the control and support of roof an
ribs. Cf. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir.
1976); Penn Allegh Coal Company., 3 FMSHRC 2767 (December 1981);
Bishop Coal Company, 5 IBMA 231 (1975). In recognition of this
negotiation process the Commission has held that:

> [A]fter a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.

Penn Allegh, 3 FMSHRC at 2770. The basis of the dispute in this c
a disagreement over the application of provisions of the previously
agreed upon plan. The plan did not include a specific drawing for
mining and roof support sequence to be followed during the mining
intersection, a routine occurrence. The Secretary argued and the
found that Drawing No. 1 of the approved roof control plan applied
the mining of the intersections. Under Drawing No. 1, a second te
jack is installed after the third cut of coal has been mined and b
a fourth cut is mined. Because the second temporary jack was not
and a fourth cut of coal had been mined, the judge found that U.S.
was in violation of its approved roof control plan and of 30 C.F.R
75.200. 6 FMSHRC 2696-97. For the reasons that follow, we conclu
that substantial record evidence supports the judge's findings con
the applicability of Drawing No. 1 and the violation thereof.

At the hearing MSHA Inspector Moody stated that Drawing No. 1
applicable to the intersection. The inspector acknowledged that D
No. 1 depicts an entry with two ribs of coal and that the intersec

---

Footnote 4 end.

and their actions are directly attributable to their employer. Ho
this issue was not raised before the judge. Instead, it was first
advanced on review. Absent a showing of good cause, section
113(d)(2)(A)(iii) of the Mine Act precludes our review of uestion

Steel's chief mine inspector established that a fourth cut of coal was mined and a second temporary jack was not installed.

U.S. Steel contends that the judge erred in concluding that Drawing No. 1 applies. It argues that a different provision of its plan, Drawin No. 23, applies to the mining of intersections. It states that Drawing No. 23 depicts a situation where it is unnecessary for a miner to proce under unsupported roof to advance ventilation or to take gas samples. According to U.S. Steel, the only purpose of the temporary jacks indicat in Drawing No. 1 "is to protect people going under the roof to advance curtain, take tests, or set bolts." Brief at 8. It asserts that in the mining of the cited intersection there was no need for a miner to go under unsupported roof in order to advance line curtains or take gas samples. Stating that Drawing No. 23 is more analogous to the cited intersection than Drawing No. 1, it argues that the setting of temporary jacks was not required and that it did not violate its roof control plan in this respect. 5/

Section 113(d)(2)(A)(ii)(I) of the Mine Act mandates that factual findings of administrative law judges be upheld if supported by substantial evidence of record. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The judge here found the conclusion that Drawing No. 1 applied to the mining of intersections to be "inescapable". We might not have reached this conclusion so readily. The operator's argument that Drawing No. 23 also can be analogized to the mining of intersections because the required ventilation and gas testing can be accomplished from under the adjoining previously bolted entry cannot be rejected summarily. If all required ventilation and gas testing can be accomplished from an adjoining entry without miners entering under unsupported roof, then Drawing No. 23, viewed in conjunction with Drawing No. 24, conceivably could be read to support the mining sequence argued for by U.S. Steel. However, we

5/ U.S. Steel also argues that even if Drawing No. 1 applied the setting of a second jack was not required until mining sequence No. 3 was completed, and that this had not yet occurred. This argument is rejected. MSHA Inspector Swarrow and U.S. Steel's witness Cortis testifi that cut No. 4 had been completed except for a little "cleaning up." Even if cut No. 4 was not completely finished, a second jack was require under Drawing No. 1 immediately upon completion of cut No. 3. The subsequent determination to remove more roof would not have affected the previously triggered requirement of setting a second jack.

Accordingly, we affirm the judge's conclusion that Drawing No. 1 s applicable and was violated. We note, however, that roof control ans are reviewed at least every six months. If U.S. Steel continues believe that a provision other than Drawing No. 1 should apply when ning an intersection, it has the opportunity to pursue this when the an is next reviewed.

For the foregoing reasons, we reverse the judge's finding that U.S. eel was negligent in connection with the two miners working under supported roof, and we remand to the judge for recomputation of an ropriate penalty. We also affirm the judge's conclusion that U.S. eel violated 30 C.F.R. § 75.200 by failing to install a second mporary jack pursuant to Drawing No. 1 of U.S. Steel's approved roof trol plan. 6/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford has elected not to participate in the consideration disposition of this case.

ebra Feuer, Esq.
ffice of the Solicitor
.S. Department of Labor
015 Wilson Blvd.
rlington, Virginia 22203

hief Administrative Law Judge Paul Merlin
ederal Mine Safety and Health
Review Commission
730 K Street, N.W.
ashington, D.C. 20006

ADMINISTRATIVE LAW JUDGE DECISIONS

Contestant	:	
	:	Docket No. CENT 86-
	:	Citation No. 263504
	:	
SECRETARY OF LABOR,	:	Homestake Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCE
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 85-
Petitioner	:	A.C. No. 39-00055-0
	:	
	:	Docket No. CENT 85-
	:	A.C. No. 39-00055-0
HOMESTAKE MINING COMPANY,	:	
Respondent	:	Homestake Mine

DECISION AND ORDER OF DISMISSAL

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., and Robert A. Amundson, Esq. Amundson, Fuller and Delaney, Lead, South Dako for Contestant/Respondent;
James H. Barkley, Esq., Office of the Solicito U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Lasher

Docket No. CENT 85-118-M. At the commencement of the h this expedited and consolidated proceeding, the Secretary mo withdraw his Proposal for Penalty Assessment for failure of motion was granted pursuant to 29 C.F.R. 2700.11 and the Sec Order and the Section 104(a) Citation No. 2358414 involved w vacated on the record. Accordingly, this docket is DISMISSE

Docket No. CENT 85-93-M. Subsequent to the commencemer hearing, and after further investigation, the Secretary move this proceeding for failure of proof. The motion, construed withdraw the Proposal for Penalty Assessment, was granted pu 29 C.F.R. 2700.11, and Citation No. 2097258 was ordered vaca

Michael A. Lasher, Jr.
Administrative Law Judge

tribution:

othy M. Biddle, Esq., Crowell & Moring, 1100 Connecticut Aven
hington, D.C. 20036 (Certified Mail)

ert A. Amundson, Esq., Amundson, Fuller & Delaney, P.O. Box 8
d, South Dakota 57754 (Certified Mail)

es H. Barkley, Esq., Office of the Solicitor, U.S. Department
or, 1585 Federal Building, 1961 Stout Street, Denver, Colorad
rtified Mail)

ted Steelworkers of America, Local 7044, 501 Main Street, Lea
th Dakota 57754 (Certified Mail)

EMERALD MINES CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 85-298-R Citation No. 2401863; 8/8/
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Emerald No. 1 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Chapman, Duff & Hasley, Pittsburgh, Pennsylvania, for Contestant;
Heidi Weintraub, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for Respondent;
Tom Shumaker, United Mine Workers of America, Masontown, Pennsylvania, for Intervenor.

Before: Judge Melick

This case is before me upon the Notice of Contest file by Emerald Mines Corporation (Emerald) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act" to challenge the issuance by the Secretary of Labor of citation No. 2401863 under the provisions of section 104(d)(1) of the Act.[1] The Secretary moved for dismissal of the case on the grounds that there wa no justiciable issue in that Emerald had already paid the civil penalty corresponding to the citation and that 90 days

[1]Section 104(d)(1) provides in relevant part as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety stand ard, and if he also finds that, while the conditions created

the motion were supplemented at limited hearings under that rule. The Secretary's motion was thereafter granted in part and denied in part. The corresponding bench decision appears below with only non-substantive modification:

> To the extent that Emerald does concede that it paid the penalty proposed by the Secretary for Citation Number 2401863 as a 104(a) citation, I find that the fact of the violation and the "significant and substantial" findings related to that citation have been the subject of a final disposition. Those issues, I find, have indeed been waived by payment of the penalty. [Old Ben Coal Co., 7 FMSHRC 205 (1985)].
>
> Now whether the 104(d)(1) "unwarrantable failure" findings that were later added to the citation have also been the subject of a final disposition by the payment of that penalty, is still an issue that may be further probed in these limited proceedings. I will provide additional opportunity for the Secretary to present evidence on that subject, pursuant to Commission Rule 64(b).
>
> So, to the extent that there does exist a genuine issue of fact based on the pleadings, documents, and affidavits submitted to me, regarding whether the 104(d)(1) citation was included in that penalty payment, and should likewise be considered waived, the Secretary's motion must be denied. [Commission Rule 64]
>
> Now, the Secretary also asserts in paragraphs 2 and 3 of his motion that the 104(d)(1) "unwarrantable failure" issue is, in any event, a moot issue. Now, there may be other reasons why this is not moot, but I find that the "unwarrantable failure" issue is not a moot issue because the history of violations attributed to Emerald reflects the existence of the more serious 104(d)(1) citation as opposed to a less serious 104(a) citation. This history could be used in

this issue is not moot, but I don't find it necessary to consider any other reasons. So, with respect to the Secretary's paragraphs 2 and 3, in his motion to dismiss, those are also denied.

Following limited hearings on the Secretary's Mo under Commission Rule 64(b) a further bench decision w rendered. That decision appears as follows:

> I am prepared to rule. I find that the testimony of Mr. Machesky [Emerald's Safety Director] is, indeed, fully credible. It is undisputed that when Mr. Machesky paid that section 104(a) citation, [on behalf of Emerald] he believed he was paying only a penalty for a 104(a) citation. I certainly accept his testimony that he did not then understand that his payment of that penalty would have had any impac on the 104(d)(1) modification to that citation.
>
> Thus, when the penalty was paid on the cita tion, it was paid as a section 104(a) citation, and the only issues that were thereby waived wer the fact of the violation cited and the amount c civil penalty. Those are the only issues that had become final by the payment of that penalty and the issue of "unwarrantable failure" survive that payment of penalty. The Secretary's motion to dismiss is, therefore, denied on that issue.

Emerald's Motion for Partial Summary Judgment u Commission Rule 64 was also considered at hearing. E sought dismissal of the "unwarrantable failure" findi the citation alleging inter alia that "an unwarrantab failure allegation must be based on an actual inspect the mine and observance of the condition as opposed t investigation performed after the fact."

The undisputed evidence on the motion is as fol On August 8, 1985, at 8:00 a.m. Joseph Koscho, an ins for the Federal Mine Safety and Health Administration issued Citation No. 2401863 under section 104(a) of t arging a "significant and substantial" violation of

in a crosscut being driven from 3 room to 2 room on 7/29/85."

On August 23, 1985, Inspector Koscho modified the ci tion changing item 9 "Type of Action" from "104(a)" to "104(d)(1)" and noting that "the subject citation is hereb modified to show item 9-type of action to be changed from 104-a to 104-d-1 as per instruction of upper MSHA supervis

The events leading to the issuance of the citation a as follows. On July 30, 1985, Inspector Koscho had receiv a section 103(g)(1) complaint concerning an alleged accumu tion of methane at the Emerald No. 1 Mine on July 29, 1985 Koscho began his investigation on July 31, 1985, by visiti the mine and talking to Lampman Don Kelly on the surface. this point he was investigating allegations that the hand- held methane detectors had not been working properly and w poorly maintained. Koscho reviewed the records concerning the methane detectors and found no violations. He then

---

[2]Section 103(g)(1) provides as follows:

"Whenever a representative of the miners or a miner the case of a coal or other mine where there is no such re resentative has reasonable grounds to believe that a viola tion of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or repre- sentative shall have a right to obtain an immediate inspec tion by giving notice to the Secretary or his authorized representative of such violation or danger. Any such noti shall be reduced to writing, signed by the representative the miners or by the miner, and a copy shall be provided t operator or his agent no later than at the time of inspec- tion, except that the operator, or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving suc notice and the names of individual miners referred to ther shall not appear in such copy or notification. Upon recei of such notification, a special inspection shall be made a soon as possible to determine if such violation or danger exists in accordance with the provision of this title. If the Seoretary determines that a violation or danger does n exist, he shall notify the miner or representative of the

to the mine and for the first time visited the underground area in which the cited violation had occurred i.e., in the crosscut between the No. 2 and No. 3 entry in the 002 section. According to Koscho, conditions on August 1 differed from conditions that reportedly had existed on the date of the violation. In this regard Koscho found "very little methane" on August 1st and observed that since the violation 2 full cuts of coal had been removed from the No. 3 entry and 1 cut from the No. 2 entry. Koscho tested the methane monitor on the continuous miner which had been used on the date of the violation and found it to be working. He also obtained records concerning the retraining of mine employees. This was a "long drawn out affair" since some records were not readily obtainable.

Upon obtaining all of the requested documentation Koscho finally wrote the section 104(a) citation on August 8, 1985. He did not observe the violation that occurred on July 29, and acknowledged that conditions were different when he was physically on-site on August 1, 1985. The citation was based upon the unsworn statements of the miners who purportedly observed the violation. On August 23, 1985, Koscho modified the section 104(a) citation to a citation under section 104(d)(1) of the Act based on the same information he used to issue the section 104(a) citation.

Within this framework of evidence it is clear that the citation at bar was not based on an inspection of the mine but upon an investigation through subsequent interviews and the examination of records conducted by the inspector several days after the incidents giving rise to the violation. A finding of "unwarrantable failure" under section 104(d)(1) must however be based upon an "inspection" of the mine. See Emery Mining Corporation, 7 FMSHRC 1908 (1985) (Judge Lasher) citing therein the order of Judge Steffey in Westmoreland Coal Company, WEVA 82-340-R et.al); Southwestern Portland Cement Company, 7 FMSHRC 2283 (1985) (Judge Morris) and NACCO Mining Company, 8 FMSHRC _____ (Jan 14, 1986) (Chief Judge Merlin). Under the circumstances the "unwarrantable failure" allegation herein cannot be supported and the citation as a citation under section 104(d)(1) of the Act must fail.

Accordingly the Motion for Partial Summary Decision filed by Emerald is granted and the citation at bar is

Gary Melick
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Rose, Schmidt, Chapman, Duff & Hasley, 900 Oliver Building, Pittsburgh, PA 15222-5369 (Certified Mail)

Heidi Weintraub, Esq., Office of the Solicitor, Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Tom Shumaker, Safety Inspector and Mary Lou Jordon, Esq., United Mine Workers of America, 32 Main Street, Masontown, PA 15461 (Certified Mail)

rbg

COMPANY, Contestant	:	Docket No. LAKE 85-76-R Order No. 2330257; 4/25/8
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING: Docket No. LAKE 85-37 A. C. No. 33-00968-03582
v.	:	Docket No. LAKE 85-93 A. C. No. 33-00968-03609
YOUGHIOGHENY AND OHIO COAL COMPANY, Respondent	:	Nelms No. 2 Mine

DECISION

Appearances: Robert Kota, Esq., St. Clairsville, Ohio, for Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor U. S. Department of Labor, Cleveland, Ohio, for Respondent/Petitioner.

Before: Judge Maurer

These consolidated cases are before me pursuant to section 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). Docket No LAKE 85-37 is a civil penalty proceeding filed by the petitioner against the respondent seeking a civil penalty assessment in the amount of $500 for an alleged violation of 30 C.F.R. § 75.403 as noted in section 104 (d)(1) Citation No. 2331148. The primary issues before me in this case are whether Youghiogheny and Ohio Coal Company (Y&O) violated the regulatory standard at 30 C.F.R. § 75.403 and, if so, a determination must be made as to the appropriate civil penalty to be assessed for that violation considering the

seeks a civil penalty of $305 for alleged violation of 30 C.F.R. § 71.100. In the notice of contest case, the issues are whether a valid order was issued and whether it should be sustained, vacated, or modified. In the civil penalty case, the issues are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

An evidentiary hearing was held in Wheeling, West Virginia, on October 24, 1985. The parties filed post hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

STIPULATIONS

The parties stipulated to the following (Tr. 10):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. The Y&O Coal Company is a moderate-sized operator.

3. The Y&O Coal Company is an operator as defined by §3(d) of the 1977 Mine Act.

4. The Nelms No. 2 Mine of the Y&O Coal Company is a mine as defined by §3(h) of the 1977 Mine Act.

5. The amount of penalty assessed would not impair the operator's ability to continue in business.

I. Docket No. LAKE 85-37 (Citation 2331148)

This citation was issued by MSHA Inspector Frank J. Kolat on September 5, 1984, and alleges as follows:

> The floor, roof and ribs in the crosscut between E to D entry were inadequately rock dusted in the #7 Seam Mains left side (015-0) work section. Starting at 15 + 47 crosscut betwee to D entry

Bill Wright was the unit manager in charge.

Inspector Kolat testified at the hearing that tember 5, 1984, he, accompanied by Mr. Andy Jacub Y&O's safety staff and Mr. Larry Ward from the uni committee entered the Nelms No. 2 Mine and proceed area of the mine known as the No. 7 Seam, 3 sectio No. 015. This was an active working section. The on the section at approximately 9:15 a.m. Kolat i six entries in this section--A-1, A, B, C, D and E inspecting D entry he found the floor was black fo distance of 109 feet from the face. Additionally, the floor, roof, and ribs were black for approxima feet in the crosscut between D to E. However, as points out, the inspector was less than convincing his cross-examination as to whether the area needi dusting in D entry was 109 feet, 66 feet, or 86 fe somewhere in between. The preponderance of eviden this point indicates to me that the petitioner has his burden of proof to the extent that 86 feet plu unspecified distance beyond in D entry needed rock to be in compliance with 30 C.F.R. § 75.403 1/ and find. I note that the respondent does not contest fact that there was a violation of 30 C.F.R. § 75. maintains that only 66 feet needed rockdusting and only 6 feet was required to be immediately rockdus the operator is required to clean and rockdust onl 40 feet of the face and then another cut of coal m taken which equals 60 feet. Likewise, with regard area inadequately rockdusted in the crosscut betwe entry, respondent does not dispute the regulatory

---

1/ 30 C.F.R. § 75.403 provides:

Where rock dust is required to be applie shall be distributed upon the top, floor, and of all underground areas of a coal mine and m tained in such quantities that the incombusti content of the combined coal dust, rock dust, other dust shall be not less than 65 per cent but the incombustible content in the return a course shall be no less than 80 per centum. methane is present in any ventilating current

Inspector Kolat took methane readings at the face areas of the entries and found 0.1% to 0.3% at the faces. He also took three dust samples; the first, from the floor of the crosscut between D and E entries was 15% incombustible; the second, from the roof and ribs of the crosscut between D and E entries was 16.2% incombustible; and the third, from the floor of D entry, was 26% incombustible. These results do indeed fall far below the 65% incombustible content required by 30 C.F.R. § 75.403.

Accordingly, I find that a violation has been proven. An appropriate civil penalty must also be assessed if a violation is found and a determination must be made as to whether that violation was "significant and substantial."

On that morning, respondent had nine men and some mini equipment operating on this section. They had a roof bolti machine operating in C entry at the face and a scoop car operating in A and B entries. However, the respondent's unrebutted evidence which I find to be credible is that this equipment was in permissible condition. Further, there is no evidence that there was any float dust in the area.

A decision as to whether a violation has been properly designated as being significant and substantial must be mad in light of the Commission's rulings in that area. The ter "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

to a discrete safety hazard. In this case, Inspect
testified that the nine miners working on that sect
been subjected to an additional hazard because of t
potential increased danger of explosion and fire es
in light of the fact that this is a gassy mine, lib
over one million cubic feet of methane in a twenty-
hour period. I find that there was a discrete safe
hazard and the violation did contribute an addition
measure of danger. The third step in applying the
tion is whether there is a reasonable likelihood th
hazard contributed to will result in injury, and th
fourth step is whether there is a reasonable likeli
that the injury in question will be of a reasonably
serious nature. While I have found that there were
immediate ignition sources proven to exist at the t
the citation herein was issued, I nevertheless find
the basis of Inspector Kolat's testimony the existe
of a reasonable likelihood of increased danger of e
sion or fire resulting in serious injuries or fatal
This was an active section, 86+ feet of the floor
entry and 45 feet of the floor, roof, and ribs in
crosscut between D and E entries were black and ha
incombustible content ranging from 15% to 26% when
standard requires a minimum percentage of 65%. Fu
this is a gassy mine, liberating over one million
feet of methane in a twenty-four hour period. As
inspector testified, if you would have a gas pocke
face, ignition from whatever source would reasonab
likely lead to an explosion or fire exacerbated by
highly volatile nature of the unrockdusted areas t
would or could carry the fire on through the secti
Accordingly, I find the violation is "significant
stantial". For the same reasons, I find a high de
gravity associated with the violation, that is, th
rence of the event against which the cited standar
directed was "reasonably likely."

Appropriate Penalty

Under section 110(i) of the Act, the followin
are to be considered in assessing a civil penalty:
operator's history of previous violations, (2) the
priateness of such penalty to the size of the busi

Company's position on this issue is that the day shift foreman had every intention to clean and rockdust the areas involved before mining. However, the citation was issued first and I find that the operator is chargeable with a high degree of negligence in failing to correct this condition which it's management knew existed, especially in light of its violation history in this area. I have already stated my findings on gravity, supra, and further find that the operator did expeditiously clean up these areas and bring them into regulatory compliance after the citation was issued. Considering all of these facts, I conclude that a penalty of $400 is appropriate.

Although the parties in their closing arguments asked me to make a ruling on whether the citation herein was properly classified as an "unwarrantable failure," inasmuch as the operator did not contest this section 104(d)(1) citation pursuant to section 105(d) of the Act, I am without authority to consider the special "unwarrantable failure" finding in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Company, PIKE 78-70-P (1979). There is, however, ample evidence to support such a finding herein.

II. Docket Nos. LAKE 85-76-R and LAKE 85-93 (Citation 2330248 and Order 2330257)

These cases involve the issuance of a section 104(a) citation (No. 2330248) on March 14, 1985, and a related

Based on the results of three (3) valid dust samples collected by MSHA inspector the average concentration of respirable dust in the working environment of the designated work position 902-0-392, was 4.2 mg/m3 which exceeded the applicable limit of 2.0 mg/m3. Management shall take corrective action to lowcr the respirable dust and then sample each production shift until five (5) valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. The following list of samples were those used to determinc the citation.

On the 7th, 11th, and 13th of March 1985 Inspector Vucelich conducted respirable dust sampling tests of Y&O's tipple operator. The operator wears a sampling pump while working at various locations on the surface, including the sampling plant, for approximately seven hours. The tipple operator on the 7th was Edward Krankovich. On the 11th and 13th it was Gary Fisher. The tipple operator's duties include cleaning the sampling plant for about one hour per shift where coal on conveyor belts is crushed by a hammermill. The sampling plant is an L-shaped windowless building approximately 40 fect wide, 70 feet long and about 40 feet from floor to ceiling, with a door on either end. As the coal enters the building, the hammermill crushes it. The tipple operator's job in this building is to sweep the coal dust off the walls, floors, and equipment with a broom and hand brush.

Mr. Fisher testified at the hearing and stated that th sampling plant was extrcmely dusty at the time the citation

2/ 30 C.F.R. § 71.100 provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with

The results of the three aforementioned respirable dust sampling tests were 3.3 milligrams of respirable dust on March 7, 1985; 1.5 milligrams on March 11, and 8.0 on March 13, 1985. Theaverage was 4.2 milligrams. This amounts to a violation of 30 C.F.R. § 71.100 which requires that exposure level be maintained at 2.0 milligrams or less. The operator again admits that there was a violation of the cited standard and accepts the fact that the samples showed this.

On March 14, 1985, after he received the results of the sampling, Inspector Vucelich issued the 104(a) citation herein and gave the company twenty working days to abate the same.

The operator was and had been aware of the excessive dust in the sampling plant and was attempting to alleviate the problem. They tried various corrective measures such as washing it down with a water hose, installing limit switches on the feed conveyor to shut down the hammermill when there was no coal on the conveyor, and using small industrial-type vacuum cleaners. None of these things worked. Ultimately, they installed a total dust collection system at a cost of $45,000.

Inspector Vucelich made a finding of moderate negligence on this citation because the hazard presented, i.e., an extremely dusty environment, could cause an occupational illness called coal worker's pneumoconiosis or "black lung," and these conditions had prevailed in the sampling plant for some two years, since it was opened in 1983. He made a gravity finding of "reasonably likely" and marked this as a "significant and substantial" violation because the level of respirable dust in the sampling plant was such that it was reasonably likely to lead to serious health problems for the tipple operators who spend approximately one hour a day in that environment and/or could cause an ignition of coal dust.

In its defense, Y&O contends that even though the sampl demonstrate a violation of 30 C.F.R. § 71.100, the negligenc finding, the gravity finding and the "S&S" finding on the

of the tipple operators who had to spend approximately one hour per shift in that environment for a period of two years, it is evident to me that it is reasonably likely there has been some adverse impa to their health of a serious nature, i.e., chronic lu. sease (pneumoconiosis). The additional danger of an explos n caused by the suspended float dust also existed for this extended period of time. I find that the violation has been proven as charged.

The Withdrawal Order

During the abatement period, the operator took and submitted samples as follows:

March 20, 1985	1.4 milligrams
March 21, 1985	1.5 "
March 22, 1985	3.9 "
April 8, 1985	1.5 "
April 9, 1985	3.9 "

The average respirable dust concentration of these five samples is 2.4 milligrams which was still out of compliance with the pertinent regulation.

Therefore, on April 25, 1985, Inspector Vucelich issued a section 104(b) withdrawal order alleging as follows:

> Results of the five (5) most recent samples received by ADP and collected by the operator from the working environment of the designated work position surface area No. 902-0 occupation code 392 shows an average concentration of 2.4 mg/m3. Due to the obvious lack of effect by the operator to control respirable dust, the period of reasonable time for abatement of this violation is not further extended and all miners working in the area shall be withdrawn until the violation is corrected.

When Inspector Vucelich issued the aforementioned order, it is clear and undisputed that the violation had not been abated within the time specified in the citation, i.e., by 8 a.m. on April 15, 1985. The question before me then is

ollowing factors should be considered: (1) the degree of anger that any extension would have caused to miners, (2) e diligence of the operator in attempting to meet the ime originally set for abatement, and (3) the disruptive ffect an extension would have had upon operating shifts. onsolidation Coal Company, BARB 76-143 (1976).

The overriding consideration in this regard is, of ourse, the degree of danger that any extension would have aused the tipple operators. It is obvious that any extenion of the abatement period would have commensurately xtended the individuals' exposure to the hazards enumerated bove.

The second consideration is the diligence of the operator in attempting to meet the time originally set for batement. Inspector Vucelich testified that the excessivey dusty condition had existed for some two years and in his pinion just issuing a regular citation and giving extenions was not getting the problem resolved. He stated that, ith this (b) Order we started to get results." Accordingy, I conclude that Y&O did not make a diligent effort to bate the condition until the section 104(b) order was ssued.

Lastly, the third factor to consider is the disruptive ffect that an extension of abatement time would have on perating shifts. There are no allegations made by the arties on this point and no evidence was taken apropos of his issue. Therefore, I find that any adverse effect the rder had is far outweighed by the other factors considered erein. I therefor conclude that Inspector Vucelich did ot act unreasonably in not extending the time for abatement. ccordingly, Order of Withdrawal No. 2330257 was properly ssued and is affirmed.

ppropriate Penalty

Under section 110(i) of the Act, the following criteria e to be considered in assessing a civil penalty: (1) the perator's history of previous violations, (2) the appropriteness of such penalty to the size of the business of the perator charged, (3) whether the operator was negligent,

The operator and the mine here at issue are moderate in
and it is stipulated that the amount of penalty assessed
would not impair the operator's ability to continue in
business. The only other violation of the cited standar
in evidence in this record is one in April of 1984. How
the record is replete with evidence that the operator ha
actual knowledge of the excessively dusty conditions in
sampling plant for some two years. I specifically find
that the operator was highly negligent in failing to aba
the cited condition within the time specified for abatem
after it knew of the condition for two years. It is the
obvious to me that Y&O failed to exercise good faith to
achieve timely abatement and indeed did not achieve abat
ment until after the order of withdrawal had been issued
The health hazard and potential for an ignition of suspe
coal dust was allowed to continue to exist for a very lo
period of time. These conditions posed a danger of at l
serious injury to at least two miners. Considering all
these factors, I conclude that a penalty of $400 is appr
priate.

ORDER

Citation No. 2331148 is AFFIRMED. Likewise, Citati
No. 2330248 and Order No. 2330257 are hereby AFFIRMED.
Youghiogheny and Ohio Coal Company is ORDERED to pay a
penalty of $800 within 30 days of the date of this decis

Roy J. Maurer
Administrative Law Ju

Distribution:

Robert Kota, Esq., Youghiogheny & Ohio Coal Co., P. O.
Box 1000, St. Clairsville, OH 43950 (Certified Mail)

Patrick M. Zohn, Esq., Office of the Solicitor, U. S.
Department of Labor, 1240 East Ninth St., Cleveland, OH
44199 (Certified Mail)

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 86-29-R
v.	:	Citation No. 2705734; 10/23/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine

ORDER OF DISMISSAL

Appearances: David A. Laing, Esq., and Alvin J. McKenna, Esq., Alexander, Ebinger, Fisher & Lawrence, Columbus, Ohio, for Contestant; Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia fo Respondent.

Before: Judge Broderick

Pursuant to notice, the above proceeding was called for hearing in Fairmont, West Virginia on November 20, 1985. The parties agreed on the record to a settlement of the contested citation, whereby MSHA would remove certain areas from the scope of the citation (requiring the installation of guard rails), and Contestant agreed to install berms and guardrails in the remaining areas. The abatement time of the citation wa extended.

On March 5, 1986, Contestant filed a motion to withdraw its Notice of Contest on the ground that the provisions of the agreement had been effected and the citation was terminated.

Premises considered, the motion is GRANTED and this proceeding is DISMISSED.

James A. Broderick

James A. Broderick
Administrative Law Judge

DEFAULT DECISION

Before: Judge Maurer

On February 19, 1986, a show cause order was issued in this case giving respondent ten (10) days to show cause why its ANSWER should not be struck and a DEFAULT DECISION entered against it for its failure to answer official correspondence or otherwise actively defend this case.

Respondent has again failed to respond and therefore is deemed to have waived any further right to a hearing. The proposed civil penalties shall therefore be made the final order of the Commission.

WHEREFORE IT IS ORDERED that respondent pay the Secretary's proposed civil penalties in the amount of $186 within 30 days of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

Patricia Larkin, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

E. C. Coal Sales Company, Inc., P. O. Box 2005, Beckley, WV 25802 (Certified Mail)

BOYD ASHER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 85-28-D
	:	MSHA Case No. BARB CD 84-4(
FAIRDALE MINING, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

Efforts by the Commission Chief Judge and the undersigne to serve show cause orders upon Respondent by certified and first class mail at the addresses provided by Complainant hav been unsuccessful with the documents most recently being returned marked by the U.S. Postal Service as "Attempted - No Known" and addressee "unknown" at those addresses.

Accordingly on February 25, 1986 an order to show cause was issued to the Complainant requiring him to provide evidence of service of his Complaint upon a lawfully designated corporate agent, and to provide the undersigned with the address of said corporate agent, on or before March 7, 1986. Counsel for the Complainant replied on February 28, 1986, but did not provide sufficient evidence that the complaint was served upon a lawfully designated corporate agent, did not identify any lawfully designated corporate agent upon whom service could be made and did not provide a valid address for said corporate agent.

Commission Rule 7, 29 C.F.R. § 2700.7 provides in relevant part that a complaint of discharge, discrimination or interference "shall be served by personal delivery or by registered or certified mail, return receipt requested." Rule 4(d)(3) Federal Rules of Civil Procedure (applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b)) provides that service upon a domestic corporation shall be made "by delivering a copy of the . . . complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a opy to t d endant."

Administrative Law Judge

stribution:

r. Boyd Asher, Box 835, Hyden, KY 41749 (Certified Mail)

hyllis Robinson Smith, Esq., P.O. Box 1230, Hyden, KY 41749
Certified Mail)

airdale Mining, Inc., 111 Reservation Avenue, Beckley, WV
801 (Certified Mail)

g

March 12, 1986

BRYAN P. EVERSON	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. LAKE 85-13-DM
	:	MSHA Case No. MD 84-32
ONEIDA SAND & GRAVEL, INC.,	:	
Respondent	:	Oneida Sand & Gravel

DECISION

Appearances: Roy Batista, Esq., Andrews, Greg, Batista & Andrews, Canton, Ohio, for Complainant
James B. Lindsey, Esq., Boggins, Centrone & Bixler, Canton, Ohio, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Bryan P. Everson alleging that he was discharged from Oneida Sand & Gravel, Inc. (Oneida) on March 23, 1984, in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act."[1]

In order for Mr. Everson to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by preponderance of the evidence that he engaged in an activity protected by that section and that his discharge from Oneida was motivated in any part by that activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corp, 462 U.S. 393 (1983),

---

[1]Section 105(c)(1) reads in part as follows:

"No person shall discharge . . . or cause to be discharged . . . or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any . . . mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a com-

March 21, 1984, because of hazardous conditions caused by freezing rain. According to the evidence the Complainant ha several years experience at various sand and gravel operations and knew most of the jobs in the business. He had previously worked for Oneida beginning in 1983 but, because of the seasonal nature of the business, was laid-off and began receiving unemployment benefits in December 1983. In early March 1984, Oneida vice president Rodney Smitley wishe to resume operations and tried to locate Everson. Everson was then continuing to collect unemployment benefits and was in Florida for the Daytona races. Smitley was finally able to contact Everson on March 14, 1984, and asked him to retur to work immediately. Everson, who was continuing to receive unemployment benefits, requested a delay until Monday March and Smitley agreed.

It is not disputed that Everson thereafter worked at th Oneida Plant on March 19 and 20 but called in on March 21, telling Smitley that because of the freezing rain "we can't work" and "the best thing to do was to wait for the weather to clear up". Everson also informed Smitley in this phone call that since the weather for the next 3 days was forecast to be similar he would not appear for work for the remainder of the week. Smitley then offered Everson work inside the garage but Everson declined because the heaters were not vented outside and claimed that the fumes would bother him. Everson concedes that he did not inquire as to the condition at the job site nor did he visit the job site either that da or the following 2 days. He does not contend, moreover, tha his refusal to show up for work was based on any inability t drive to work because of hazardous road conditions.

Rodney Smitley acknowledged that Everson called on the morning of March 21, and said that he was taking the rest of the week off. According to Smitley he told Everson during this phone call that it was important for him to appear for work that day because he already had trucks waiting to be loaded. Smitley anticipated that Everson would operate the front end loader, loading trucks with sand and gravel when they appeared, and while waiting for empty trucks, would wor inside the heated garage disassembling spare parts for the dragline.

It is not disputed that the front-end loader was equipp

hazard.

Smitley was obligated by contract to continue to provide sand and gravel so he found it necessary to hire a replacement for Everson. Commencing on March 22nd, the new employee performed the jobs that Everson would have performed includin work in the garage disassembling parts and loading trucks wit the front-end loader. On March 23rd Everson called Smitley asking if he could return to work the following Monday. Smitley told him that he had already been replaced.

In order for Everson's work refusal in this case to be considered protected under the Act he must prove that he then entertained a good faith, reasonable belief that to work under the conditions presented would have been hazardous. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). In this regard Everson testified that as he was driving to work on the morning of March 21st his car window started freezing up and there was ice and snow on the trees, ground and sidewalks After driving about 2-1/2 miles he stopped and called the plant, advising Smitley that the weather was so bad it would be hazardous to work. It is not disputed that during this phone call Smitley told Everson that he was needed that day to load trucks already waiting and that he could also work inside the heated garage.

The only evidence regarding conditions at the Onieda plant on that day comes from Rodney Smitley. He operated the front-end loader in Eversons absence and did not find the conditions to be hazardous. The loader was operated from a heated cab on a flat gravel surface. Thus, as a factual matter, the conditions have not been shown to have been hazardous. Moreover Everson never inquired about nor checked the conditions at the plant himself and refused to show up for work for the rest of the week based upon a long range weather forecast. Under the circumstances I cannot find that Everson entertained a reasonable or good faith belief that the conditions at the plant were hazardous in regard to the contemplated work.

In reaching this conclusion I have not disregarded Everson's testimony that he suffered a concussion several years before at another plant when he fell some 12 feet from

Gary Melick
Administrative Law Judge

Distribution:

Roy Batista, Esq., 4808 Mundson, N.W., Canton, OH 44718 (Certified Mail)

Mr. Bryan P. Everson, 800 5th N.W., Apt. 6, Canton, OH 44703 (Certified Mail)

James B. Lindsey, Esq., Boogins, Centrone & Bixler, Central Trust Tower - 7th Floor, Canton, OH 44702 (Certified Mail)

Mr. Rod Smitley, Oneida Sand & Gravel, 8000 Blade Road, Malvern, OH 44644 (Certified Mail)

rbg

---

[2]In his complaint filed with this Commission on November 16, 1984, Mr. Everson also made vague allegations of subsequent discriminatory activity and clarified at hearing that "proba in May 1984" he had been offered a job by Rod Smitley conditioned on his "unemployment" getting "straightened out" but that Smitley later said that his father would not allow because of complaints Everson made to OSHA and MSHA. The record at hearing shows that Everson in fact did file complaints to MSHA and OSHA in April 1984 and that, as a result Oneida was issued several MSHA citations. These allegations unlawful discrimination are separate and distinct from the allegations before me and have not been presented to the

BRIAN T. VEAL, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. LAKE 86-29-D
v.	:	
KERR-McGEE COAL CORP., Respondent	:	

ORDER DENYING MOTION TO DISMISS
PREHEARING ORDER

On December 19, 1985, Complainant filed a complaint alleging that he was discharged by Respondent in violation section 105(c) of the Federal Mine Safety and Health Act o 1977 (the Act). On January 14, and February 18, 1986, Respondent filed a Motion to Dismiss on the grounds that t complaint fails to state a cause of action and is frivolou The motion does not attempt to analyze or discuss the docu filed pro se by Complainant, but merely states the conclus that they do not state a cause of action under the Act.

The Complaint, in the form of a letter to the Commis dated December 16, 1985, alleges:

1) The MSHA District Manager wrote a complimentary letter to Respondent.

2) Complainant was denied the right to representati during the MSHA investigation of his complaint.

3) MSHA did not notify Complainant of the basis for denial of his complaint.

I conclude that none of these allegations state a ca of action under section 105(c) since they do not involve adverse action by Respondent against Complainant for activ protected under the Act.

The Complaint goes on to list 9 "specifications" in support of Complainant's claim:

warned of the hazard.

2. Operator and passenger training for personnel driving and riding in the gophers was brief, informal and inadequate. Safety devices were not installed.

3. The terrain in the mine was hazardous for the vehicles. The company or MSHA closed off a section following the accident.

4. Job performance competition imposed mental pressures on personnel which affected safety.

5. Complainant worked under a supervisor who was not properly certified or trained.

6. Respondent provided false information to the MSHA investigator concerning Complainant's safety records.

7. Respondent failed to provide prompt and proper emergency medical treatment following Complainant's accident and performed blood analysis testing without reasonable cause.

8. The investigation failed to recognize a deficiency in the training and qualifications of instructors.

9. The Respondent prompted and coaxed witnesses during the investigation and attempted to force Complainant to sign an accident report which was false.

e claim filed with MSHA on October 8, 1985 asserted that mplainant had been dismissed because he had an accident cause of bad brakes on a vehicle that had been red tagged. he PV was given to me to use by my supervisor who had been iving it and there was no red tag on it." The complaint rther stated that Complainant was discharged because he is king medication for an injury due to a previous accident.

The file contains a copy of a handwritten statement taken an MSHA Investigator on November 6, 1985, which copy was nt to the Commission by Complainant.

employees that they were beat out of a safety award be
my accident . .

The statement describes the accident of Septembe
1985 when Complainant was driving a PV and collided wi
pillar because he had no brakes. The following day he
asked to sign an accident report, but refused "because
not state the cause of accident properly." ". . . the
angry and . . . harrassed me and told me to fill out a
accident report." The following day he was told he wa
terminated because he "neglected to turn in the weak b
the P.V." He was not given a written explanation of h
termination.

Complainant requests reinstatement and back pay.

In order to establish a prima facie case of
discrimiantion under section 105(c) of the Mine Act, a
complaining miner bears the burden of production and p
establish that (1) he engaged in protected activity, a
the adverse action complained of was motivated in any
that activity. Secretary on behalf of Pasula v.
Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Octo
1980), rev'd on other grounds sub nom. Consolidation C
v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary
of Robinette v. United Castle Coal Co., 3 FMSHRC 803,
(April 1981). The operator may rebut the prima facie
showing either that no protected activity occurred or
adverse action was not in any part motivated by protec
activity. If an operator cannot rebut the prima facie
this manner it nevertheless may defend affirmatively b
that (1) it was also motivated by the miner's unprotec
activities, and (2) it would have taken the adverse ac
any event for the unprotected activities alone. The o
bears the burden of proof with regard to the affirmati
defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 193
(November 1982). The ultimate burden of persuasion do
shift from the Complainant. Robinette, 3 FMSHRC at 81
See also Boich v. FMSHRC, 719 F.2d 954, 958-59 (D.C. C
(specifically approving the Commission's Pasula-Robine
The Supreme Court has approved the National Labor Rela
Boards's virtually identical analysis for discriminati
arising under the National Labor Relations Act. NLRB
Transportation Management Cor ., 462 U.S. 393, 3 7-403

complaints, (2) an animus on the the part of Respondent apparently related to those complaints.

Under the circumstances, I conclude that the documents the file allege facts which, if true, are sufficient to establish a prima facie case. Therefore, the Motion to Dism is DENIED. Respondent is ORDERED to file an answer to the complaint within 15 days of the date of this order.

PREHEARING ORDER

In accordance with the provisions of section 105(c) of the Act,this case will be called for hearing at a time and place to be designated in a subsequent notice.

The parties are directed to exchange lists of witnesse who may be called to testify at such a hearing and copies of exhibits which may be offered in evidence. Copies of witnes lists and exhibits shall be exchanged and furnished me on or before March 28, 1986. The parties shall by the same date indicate the preferred hearing site, and inform me of any da in May 1986 which would pose scheduling difficulties were I select them for hearing.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Brian T. Veal, 1612 Eldorado Street, Eldorado, IL 62930 (Certified Mail)

Carolyn G. Hill, Esq., Human Resources Division, Kerr-McGee Coal Corporation, P.O. Box 25861, Oklahoma City, OK 63125 (Certified Mail)

slk

Petitioner	:	A.C. No. 42-01[illegible]
	:	
	:	Cottonwood Mine
	:	
HYDROCARBON RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Sol
U.S. Department of Labor, Denver, Colorad
for the Petitioner;
Mr. Chad Evans, Former General Manager, H
Resources, Inc., Salt Lake City, Utah, pr

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safe
Administration (MSHA), charges respondent with violati
regulations promulgated under the Federal Mine Safety a
30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the meri
on May 21, 1985, in Salt Lake City, Utah.

The parties waived their right to file post-trial

Issues

The issues are whether respondent violated the re
so, what penalties are appropriate.

Citations

There are four citations contested in this case.

Citation 2008144 alleges a violation of 30 C.F.R.
now codified as § 57.3022, which provides as follows:

> Miners shall examine and test the back
> face, and rib of their working places at
> the beginning of each shift and frequentl
> thereafter. Supervisors shall examine th

tection shall be provided above persons at work deepening a shaft.

Citation 2008146 alleges a violation of 30 C.F.R. § 57.19-
codified as § 57.19025, which provides as follows:

(a) Wire rope shall be attached to the load by a method that develops at least 80 percent of the nominal strength of the rope.

(b) Except for terminations where use of other materials is a design feature, zinc (spelter) shall be used for socketing wire ropes. Design feature means either the manufacturer's original design or a design approved by a registered professional engineer.

(c) Load and attachment methods using splices are prohibited.

Citation 2008147 alleges a violation of 30 C.F.R. § 57.11-
codified as § 57.11037, which provides as follows:

Ladderways constructed after November 15, 1979, shall have a minimum unobstructed cross-sectional opening of 24 inches by 24 inches measured from the face of the ladder.

Stipulation

At the commencement of the hearing the parties stipulated
uce Green, an employee of respondent, was fatally injured whe
a falling rock.

Respondent's representative further stated that the compan
employees. In addition, respondent has gross income under
r. 6-9).

The Secretary's Case

After being advised of a fatality, MSHA, by its Inspector
e s i spe ted respondent's Cottonwood Mine on December 2

an emergency escapeway and a skip compartment. The skip c
through which the mine is entered, was an open 8 by 8 foot
19). The skip bucket was 22 inches thick, i.e., from front
It had a one-ton capacity and measured 46 inches wide and 4
deep (Tr. 19, 20).

Bruce Green was killed on December 23, 1982. On the d
subsequent inspection the bottom 100 feet of the mine had f
water (Tr. 20, 21). The inspector learned of the configura
bottom of the shaft from the company's representative, Chad
(Tr. 22).

At the time of the accident the mining procedure was f
miners to hand muck the ore in the bottom of the shaft. Th
thereafter hand muck the ore into the skip bucket when it r
after a six-minute trip to the surface. When the skip was
moved to the surface, the miners would continue digging in
compartment and move the ore to the utility and manway comp
(Tr. 22-25, 29-30). The company had been mining in this ma
three weeks. Prior to that time the miners used a vacuum s
move the gilsonite to the surface. But that system became
three weeks before the accident (Tr. 22).

When the bucket went up and down the shaft it dragged
and the hanging wall (Tr. 28). When the inspector descende
shaft he observed and sounded the loose ground in a number
The following levels were tested: 10 to 60, 163, 170, 177,
215, 240, 290, 300, 315 and 320. There was a large hump at
level where the shaft went from hanging to foot wall. At t
the gilsonite vein separated from the shaft (Tr. 28, 34-38)
were no bolts or lagging to prevent rocks from falling into
(Tr. 40). There was danger that the whole area of the hang
could fall from the 10-foot level to the 60-foot level. A
rocks had fallen (Tr. 40).

In the inspector's opinion the condition of loose grou
served five days after the fatality, especially at the 60-f
also existed on the day of the accident (Tr. 39, 40, 49).

1/ A f o wall is at the bottom of an angle; hanging wa

ɔed at the surface (Tr. 33).

In a mine of this type a bulkhead should be positioned immed
ly over the miners working in the bottom of the shaft. The bu
tects the miners from being struck by any material that might
the shaft. There were bulkheads over the utility and manway c
ts together with a landing every ten feet (Tr. 26-29, 62-63).

Bruce Green was killed when he was struck by a 6 by 6 by 1/2
k. At the time Green and his father were basically under the
ɔartment. Bruce Green had reached out and was mucking in the
the shaft (Tr. 41, 42, 61). A proper bulkhead over the skip w
e prevented the rock from striking the miner (Tr. 42).

The company's log books failed to indicate that there had be
shaft inspection from December 21 through December 23 (Tr. 44

Inspector Beason also inspected the six U-bolts that held th
the skip bucket. The saddle was on the shorter, or the dead e
rope. The rope can be damaged when a bolt is placed on its w
. The bolt itself is designed so as to protect the live end c
e (Tr. 45, 46, 79).

The manway compartment served as an emergency escapeway. Te
t ladders extend from one level to another. Several of the ma
s were obstructed. One such passage, through a bulkhead, meas
y 8 inches by 14 inches. To continue up the manway it would b
essary to crawl out into the open shaft and swing up to the ne
. 46-47).

The Respondent's Case

Chad L. Evans indicated that he was the general manager for
ɔany at the time of this accident.

Evans, who was present during the MSHA inspection, also conc
own investigation (Tr. 87-89). The witness submitted a drawi
shaft (Tr. 90, 91; Ex. R1).

Evans indicated that as the bucket was ascending, Royce Gree
standing under the utility area and his son was under the ma
. The miner was killed when he bent over to pick up a shovel

Evans had instructed his miners never to go into a ski
ment without overhead protection (Tr. 120). Evans' mining
indicated a need for a bulkhead before the fatality (Tr. 12
He had been advised that a bulkhead was in place. The plac
skip over the miners constituted such a bulkhead (Tr. 124,

In rebuttal Inspector Beason testified that Evans indi
he had not known that a bulkhead was necessary (Tr. 130, 13
addition, the hoist reports and daily logs indicated that 2
were moved on the day shift. This evidence contradicted Ev
mony that three buckets were moved each shift (Tr. 133). T
of buckets indicated to the inspector that the two miners w
when the skip was moving (Tr. 126, 133).

Discussion

We will consider the citations in numerical sequence.

Citation 2008144

This citation requires that the ground be taken down o
quately supported before any other work is done. The opera
to comply with this regulation. The inspector described in
loose ground he both observed and sounded in the shaft. Re
manager confirmed this evidence when he testified that fort
of the loose was removed in abating the violative condition

Citation 2008144 should be affirmed.

Citation 2008145

The evidence relating to the installation of a substan
head indicates there was no such bulkhead. The operator's
confirmed this condition. The miners at the time were deep
shaft. These work conditions made the standard directly ap

Citation 2008145 should be affirmed.

structed after November 15, 1979. There is no evidence in this e indicating when this ladderway was constructed.

Such evidence is necessary in order to sustain a violation of regulation.

Civil Penalties

The statutory mandate for assessing civil penalties is conned in 30 U.S.C. § 820(i). It provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Secretary proposed the following penalties:

Citation 2008144 (loose ground)	$4,000
Citation 2008145 (bulkhead)	2,000
Citation 2008146 (U-bolts)	20
Citation 2008147 (ladderways)	20

The record indicates the operator had no previous violations . 85; Ex. R2, R3, R4, R5). The operator should be considered a ll in view of its income as well as the number of its employees negligence of the operator is apparent inasmuch as the violati

e death of the miner, hence the gravity is apparent and exceed
igh. In support of its good faith the operator argued that it
ways attempted to provide a conscientious and well-maintained
ffort (Tr. 145, 146). The evidence fails to establish the oper
laim. However, the company established its statutory good fait
ating the violative conditions in this case.

On balance, I believe the penalties as set forth in the ord
his decision are appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in
arrative portion of this decision, I enter the following conclu
f law:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 57.3-22, § 57.19-110 an
57.19-24(b).

3. The Secretary failed to prove a violation of 30 C.F.R.
57.11-37.

ORDER

Based on the foregoing findings of fact and conclusions of
enter the following order:

1. Citation 2008144 is affirmed and a penalty of $2,000 is
ssessed.

2. Citation 2008145 is affirmed and a penalty of $2,000 is
ssessed.

3. Citation 2008146 is affirmed and a penalty of $20 is
ssessed.

4. Citation 2008147 and all penalties therefor are vacated

5. Respondent is ordered to pay to the Secretary the sum o
4,020 within 40 days of the date of this decision.

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 85-23-M A.C. No. 42-00415-05506 Cedar City Mine
v.	:	
WESTERN ROCK PRODUCTS CORPORATION, Respondent	:	Docket No. WEST 85-24-M A.C. No. 42-01572-05509 Sorenson Pit Mine

DECISION APPROVING SETTLEMENT

Appearances: Robert J. Lesnick, Esq., Office of the Solic
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Darrell G. Whitney, Western Rock Produc
Corporation, St. George, Utah,
pro se.

Before: Judge Lasher

Subsequent to the commencement of the hearing in the two consolidated dockets, Respondent agreed to pay the pe set forth in the Secretary's Proposal for Penalty in full wit:

Docket No. WEST 85-23-M

Citation No.	Proposed and Agreed Penalty
2358849	$ 227.00
2358850	20.00
2358851	227.00
2358852	227.00
2358853	227.00
2358854	276.00
2358855	276.00
TOTAL	$1,480.00

2360661		20.00
2360662		20.00
2360663		20.00
	TOTAL	$178.00

Both parties agreeing, and the settlement appearing onable and proper, the settlement was approved from the bench approval is hereby affirmed and both proceedings are SSED. The reasonableness and good faith approach of both es is noted.

ORDER

Respondent if it has not previously done so, is ordered to o the Secretary of Labor within 30 days from the date hereof sum of $1,658.00.

Michael A. Lasher, Jr.
Administrative Law Judge

ribution:

rt J. Lesnick, Esq., Office of the Solicitor, U.S. Depart- of Labor, 1585 Federal Building, 1961 Stout Street, Denver, 80294 (Certified Mail)

Darrell G. Whitney, Western Rock Products Corporation, 675 N. strial Road, #3, St. George, UT 84770 (Certified Mail)

Appearances: Martha Perando, Deer Park, Maryland, pro se
Lisa B. Rovin, Esq., Crowell & Moring, Washington, DC on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by Martha Perando under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination and discharge by the Mettiki Coal Corporation (Mettiki) in violation of section 105(c)(1) of the Act.

More particularly Ms. Perando has cited five alleged acts of discrimination culminating in her discharge on March 27, 1985:

> First, I was not advised of my rights as a miner. Second, I was transferred from the mine sight [sic] to the lab at a loss of pay. Underground gross $520.20. Lab gross $383.20. The lab was not any better. Third, the form 11001 has not been filed after reporting shortness of breath and heavy preasher [sic] on my chest. Fourth, I was harassed due to filing a compensation claim against Mettiki Coal, letters of reprimand being placed upon me without any notice of not doing the work up to the standards of the company. Fifth, I was terminated on March 27, 1985 while off work under doctor's care.

Mettiki subsequently filed a motion to dismiss the complaint on the grounds that it failed to state a claim for which relief may be granted under section 105(c)(1) of the

of her complaint and clarified the remaining paragraphs. To the extent that there is any deviation from her original complaint with respect to paragraphs 2, 4 and 5, I consider the complaint to have been amended by Ms. Perando's testimonial presentation.

In determining whether the complaint in this case "fails to state a claim for which relief may be granted under 105(c)(1)" of the Act, the well pleaded material allegations of the complaint are taken as admitted. Goff v. Youghiogheny & Ohio Coal Company, 7 FMSHRC 1776 (1985); 2A Moores Federal Practice ¶12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the Complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. id.

---

[1] Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such

informed by her doctors that she should no longer wo
underground coal mine environment. Ms. Perando main
that she informed Mettiki officials that she could n
work underground and thereafter was given a lower ra
for work in the laboratory.

I find that these allegations are sufficient u
either of two theories of unlawful discrimination un
Act. Her loss of pay following transfer could be vi
retaliation for "notifying the operator or the opera
agent . . . of an alleged danger . . . or health vio
In addition her allegations could support a claim of
inatory reduction in pay because of a protected work
i.e., the refusal to continue working in the good fa
reasonable belief that to continue working would hav
hazardous. Miller v. FMSHRC, 687 F.2d 194 (7th Cir.
Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1
Accordingly I find that Perando's complaint in this
presents a claim or claims cognizable under the Act.

In reaching this conclusion I have not disrega
Respondent's argument that the right of transfer wit
loss of pay under section 105(c)(1) is limited to th
arising under "a standard published pursuant to sect
of the Act i.e., limited to cases where the Secretar
promulgated specific standards governing the cited h
impairment. However Ms. Perando has not alleged a v
of those specific "right-to-transfer" provisions. M
find nothing in the language of section 105(c)(1) or
Congressional intent that would bar an action based
allegations herein under the legal theories cited in
preceding paragraph. See Atkins v. Cyprus Mines Cor
8 FMSHRC _____ Docket No. WEST 84-68-M, February
(Judge Morris).

Ms. Perando also alleges in her complaint that
harrassed after she filed a workmans compensation cl
the state of Maryland. That claim was filed on Dece
1984, and alleged that she contracted industrial bro
while working underground at Mettiki. Ms. Perando a
that Mettiki officials knew of this filing and discr
against her by thereafter requiring her to report he
on a daily basis one half hour before the beginning
work, i t even though no one was present at that ti

these allegations are sufficient to set forth a claim of discrimination based on Ms. Perando's purported notificatio to "the operator or the operator's agent . . . of an allege danger . . . or health violation". Accordingly these alleg tions also present a claim cognizable under section 105(c)(of the Act.

Finally Ms. Perando alleges in her complaint that she was terminated on March 27, 1985, while off work under a doctor's care. She explained at hearing that what she mean was that she was discharged because she had a serious medic condition caused by Mettiki and that she could not and woul not work because of the hazardous health environment presen in the laboratory and in the underground mine. This complaint may also be construed as an alleged work refusal in the face of hazardous conditions. See discussion of paragraph two of the complaint, supra. Accordingly, I find tha this allegation also sets forth a claim cognizable under th Act.

Under the circumstances Mettiki's motion to dismiss filed in this case is denied. This matter will accordingly be set for hearing on the merits.

Gary Melick
Administrative Law Judge

Distribution:

Ms. Martha Perando, P.O. Box 3012, Deer Park, MD 21550 (Certified Mail)

Lisa B. Rovin, Esq., Crowell, Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036 (Certified Mail)

rbg

SECRETARY OF LABOR,	:	DISCRIMINATION PROC
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 86-
ON BEHALF OF	:	MSHA Case No. MADI
JOHNNIE LEE JACKSON,	:	
Complainant	:	Rogers No. 2 Mine
v.	:	
	:	
TURNER BROTHERS, INC.,	:	
Respondent	:	

DECISION AND ORDER DENYING TEMPORARY REINSTATI

Appearances: Frederick W. Moncrief, Esq., Office
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Complainant
Robert Petrick, Esq., General Counse
Secrest, Assistant General Counsel,
Brothers, Inc., Muskogee, Oklahoma,
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns an Application for Te
Reinstatement filed by MSHA on January 22, 1986, pu
section 105(c)(2) of the Federal Mine Safety and He
of 1977, and Commission Rule 29 C.F.R. § 2700.44(a)
the temporary reinstatement of the complainant John
Jackson to his position of bulldozer operator at th
dent's Rogers No. 2 Mine. MSHA has concluded that
plaint of discrimination filed by Mr. Jackson is no
frivolous. In support of this conclusion, MSHA inc
affidavit executed by Michael Yanak, Jr., Technical
Compliance specialist, Office of Technical Complian
Investigation, MSHA, Arlington, Virginia, a copy of
plainant's complaint executed September 23, 1985, a
statement executed by him on September 18, 1985.

Issue

The issue presented in this proceeding is whether or not the complainant is entitled to temporary reintatement pending the adjudication of the merits of his claim that he was unlawfully discharged for making safety complaints to mine management.

MSHA's Testimony and Evidence

Complainant Johnnie Lee Jackson testified that he was discharged by the respondent on September 9, 1985. At the time of his discharge he was employed as a D-10 bulldozer operator, and he had been employed by the respondent for 4-1/2 years. He stated that he had operated the bulldozer for approximately a year and a half and that he has 10 years of experience as a bulldozer operator (Tr. 25-26).

Mr. Jackson stated that he believed he was discharged because the respondent wanted to get rid of him for making safety complaints about his bulldozer. He stated that he was discharged by mine superintendent Ronald Sisney, and he asserted that Mr. Sisney gave him no reason for the discharge Mr. Sisney simply told him that Robert Turner, the mine owner told him to fire him and that if he didn't, Mr. Turner would fire Mr. Sisney (Tr. 27-28).

Mr. Jackson stated that immediately prior to his discharge the left wall of the rock overburden which had been shot caved in on his bulldozer and came through the door of his machine. He was in the process of "slot pushing" the overburden with his machine. The overburden was being pushed into the pit and he was pushing or cutting 22 foot wide cuts while taking the overburden down to the coal layer. He described the procedure and the work being performed immediately prior to the accident.

Mr. Jackson stated that after the material caved in on his machine he had to climb over the rock in order to get out of his machine. After getting out of his machine, he waited for approximately 10 minutes, and mine operator Robert Turner was the first person to appear at the scene (Tr. 29-36).

the left tra . and hood, and one rock came through the window on the drive 's side of the machine. He climbed out and over the rock f m the left side of the machine. He could not get out of t' right side because the right door latch would not work ar .e could not get the door open (Tr. 38).

Mr. Jackson stated that the right door of his machine could not be opened, and he asserted that it had been in this condition for "a couple of weeks." He stated that he had complained about the condition of the door daily to Mr. Sisne and to the dirt foreman, Terry Beck. When he complained to Mr. Sisney, Mr. Sisney simply told him to use the left door. Mr. Jackson believed that the condition of the door was unsaf because he could be trapped in the machine in the event of an emergency (Tr. 39-41).

Mr. Jackson described how he got out of his machine afte the rock slide, and he stated that he sustained injuries to the lower right side of his back and to his neck between the shoulder blades, and that glass got into his eyes (Tr. 42). He received medical treatment for his injuries, and a doctor advised him that he had a 10 percent disability because of hi injuries (Tr. 43).

Mr. Jackson stated that the accident was not avoidable, and that while in his machine he was watching the highwall, which was his normal practice. He stated that the highwall "looked good" prior to the accident, and "it looked like a good solid wall" (Tr. 44). In his opinion, there was nothing he could have done to foresee the accident, and he confirmed that it had never happened to him in the past.

Mr. Jackson stated that he was aware of the fact that the respondent has fired other employees for causing accidents and for being involved in accidents which they did not cause. He was also aware of individuals who have commented that they were either involved in accidents or caused accidents but were not fired (Tr. 46). He has never seen any written company policy stating that causing or creating an accident would result in a discharge (Tr. 47).

Mr. Jackson stated that he constantly complained about the slick tracks on his machine, but he indicated that any safety concern over this condition would depend on where the machine was operating. The slick tracks would be a safety problem if the machine were operating on a hill because there would be no traction. However, while "slot pushing" on level ground, the slick tracks would not present a safety hazard. He operated his machine with slick tracks for approximately a month and a half, but the respondent took care of the problem and replaced the tracks. The tracks on his machine were replaced approximately 2 or 3 weeks before the accident (Tr. 49-53).

Mr. Jackson stated that he also constantly complained about the rear-view mirrors being knocked off of the end-dump machine he was operating (Tr. 54). He confirmed that the mirrors are knocked off trucks at least once a month by the end loaders, and he conceded that this was "normal wear and tear" (Tr. 56). He confirmed that the respondent eventually would replace the mirrors, but only after his repeated complaints (Tr. 58).

Mr. Jackson confirmed that he knew he had a right to refuse to operate unsafe equipment, and he conceded that he would operate a piece of equipment which he knew to be unsafe ecause he had to work to support his family. He also confirmed that while he never refused to operate a piece of equipment which lacked a rear view mirror, he engaged in heated arguments over the condition. He conceded that on one occasion a foreman took a truck out of service until the rear view mirrow was replaced (Tr. 60).

Mr. Jackson stated that he also complained about the D-clutch brakes on the 992 loaders, but that "nobody ever seemed to care whether they was working right or not." He believed that he would have been fired had he refused to operate equipment which he considered to be unsafe because "there's too many people out there that would run it" (Tr. 60).

inform Mr. Sisney, Mr. Beck, or Mr. Turner that he had suffered any injuries as a result of the accident (Tr. 62).

Mr. Jackson stated that he was not presently experiencing any discomfort to his neck, back, or side as a result of his injuries. He confirmed that he did suffer back and eye injuries as a result of the accident. He also confirmed that he has filed a workmen's compensation claim because of ear damage "because of the overall period of running the machinery." He stated that his doctor advised him that his hearing is being impaired because of the large machinery noise to which he is exposed. When asked whether he will continue to be exposed to loud noise if he operated bulldozers and heavy equipment, he responded "that's what I do for a living" (Tr. 64). He also stated that his doctor advised him to get better ear protection. He conceded that he "sometimes" wore ear protection but could not remember whether he was wearing earplugs while operating his machine at the time of the accident (Tr. 65).

Mr. Jackson denied that he was ever stopped in the operation of his equipment by his foreman or supervisor and told to wear his hard hat or to cease operating the machine with his doors open. He admitted that he was told to wear his seat belt, and to wear his hard hat while on the job (Tr. 66).

Respondent's counsel produced a medical report from Mr. Jackson's doctor dated November 21, 1985, stating that Mr. Jackson has a 10 percent partial disability and that he is released from treatment. Counsel pointed out that the report does not state that Mr. Jackson is physically able to go back to work, and in fact states that "he will probably experience chronic reoccurring symptoms" (Tr. 71, exhibit R-3), and Mr. Jackson acknowledged the report (Tr. 75).

Respondent's counsel produced a state workmen's compensation claim filed by Mr. Jackson on September 12, 1985, based on his back and eye injuries, and "nerves and ulcer" conditions, and Mr. Jackson acknowledged that the claim is still pending and that he is represented by an attorney in that matter (Tr. 72-73; exhibit R-1).

sufficiently to be able to return to regular work without restrictions and by agreement of the parties it was made a part of the record as exhibit RX-4 (Tr. 76-78).

Mr. Jackson explained the "slot dozing" procedures he followed while operating his bulldozer, and he stated that would not have been there if the highwall appeared unsafe. He also explained the condition of the wall as it appeared him before the accident occurred (Tr. 78-83).

Mr. Jackson confirmed that Mr. Sisney, Mr. Beck, and Mr. Turner were the only individuals present during the period immediately after the accident and his discharge, an that none of them gave him any verbal reasons for his termination (Tr. 84).

Mr. Jackson stated that he was positive that his prior complaints concerning the right door of the D-10 bulldozer being inoperable for 2 weeks referred to the same bulldozer he was operating at the time of the accident. He denied th Mr. Sisney exited from the right door of the bulldozer afte retrieving and giving him his personal belongings from the bulldozer involved in the accident. He claimed that Mr. Sisney exited out over the top of the rock, and that Mr. Sisney tried to get in through the right door but could not (Tr. 85).

Mr. Jackson stated that he previously operated bulldoz 817, which was an older machine, but was subsequently given new dozer 529 approximately a month or a month and a half prior to the accident. He confirmed that the new machine h been completely rebuilt and that new tracks were installed approximately 2 to 3 weeks prior to the accident (Tr. 86).

Mr. Jackson stated that the bulldozer he was operating at the time of the accident was completely enclosed with glass, had a center mirror, and had a seat which enabled hi to see to the front, back, and side (Tr. 87).

complaints, Mr. Jackson responded as follows (Tr. 89-

> THE WITNESS: No. I always knew they wanted to fire me because I complained too much.
>
> THE COURT: Well, if the accident hadn't happened, would they have fired you?
>
> THE WITNESS: First chance they got.
>
> THE COURT: You mean to tell me that for four and a half years they couldn't find an excuse to fire you if they wanted to fire you?
>
> THE WITNESS: No, they could have fired me.
>
> THE COURT: But they didn't.
>
> THE WITNESS: No, they didn't.
>
> THE COURT: You say they were using this as some kind of an excuse, the accident as some kind of an excuse?
>
> THE WITNESS: I would say so.

Mr. Jackson confirmed that he had an ulcer condi
prior to his employment with the respondent, and he a
edged that he missed some work as a result of this c
but continued his employment with the respondent (Tr
He also acknowledged that he had some financial probl
that the respondent loaned him money to assist him i
ing these problems and kept him employed regardless
nishment and tax levies filed against him (Tr. 91).
acknowledged that when he requested to work overtime
respondent allowed him to do so (Tr. 91).

In response to further questions, Mr. Jackson i
exhibits C-1 and C-2 as releases from the doctors wh
his back and neck injuries and his ulcer condition i
that he was able to return to work. He confirmed tha
obtained the statements on February 3, 1986, prior t
hearing, and that he did so at the request of MSHA's
(Tr. 93). He denied that any doctor has advised him

and that he was unable to get new earplugs every day because they were not available (Tr. 95).

When asked to explain why he omitted any reference to slick bulldozer tracks when he filed his two prior statements with MSHA, Mr. Jackson responded "I just forgot about it" (Tr. 98). He also stated that he complained about other matters, but did not include them in his prior statements. He conceded that when he complained about the slick tracks and rear-view mirrors, the respondent corrected the condition (Tr. 99).

In response to further questions concerning his termination and safety complaints, Mr. Jackson stated as follows (Tr. 101-106):

> THE COURT: Well, was it the company's position that it was your fault?
>
> THE WITNESS: Was it the company's position to say it was my fault?
>
> THE COURT: Yes. This accident, when the rocks came in on your dozer, did the company take the position that you were the one that put yourself in that situation and that you were the one that could have avoided the accident but you didn't avoid it and that, therefore, that's what they were firing you for.
>
> THE WITNESS: I guess that's probably the way they looked at it.
>
> THE COURT: And no one told you that?
>
> THE WITNESS: No, no one told me that. I mean, no one, no, they didn't.
>
> THE COURT: The gentleman that said that you were fired, Ron Sisney, didn't he tell you why he was firing you?

THE WITNESS: Yeah, I asked why, but nobody answered me.

THE COURT: Did Mr. Turner talk to you at the time you were fired?

THE WITNESS: At the time I was fired, no. He talked to me later on, up at the pickup. Ron took me to my car probably -- Rob followed us up there, and I talked to him up there.

THE COURT: Did you ask Mr. Turner then why you were being fired?

THE WITNESS: I asked him for another chance. I was wanting my job back. I knew they had done fired me.

THE COURT: But nothing came up during that conversation that would give you any idea as to why they fired you?

THE WITNESS: No. They done said they fired me, and I was begging for my job back, is what I was doing.

THE COURT: Do you have any idea why they fired you? What did you believe? What did you speculate? You must have had -- something must have gone through your mind as to "why they are doing this to me."

THE WITNESS: They wanted to get rid of me.

THE COURT: For what reason?

THE WITNESS: Cause I complained a lot, complained a lot, and it looked like the dozer was tore up, I guess you could say. I really can't say, you know. It's my opinion.

knowing whether they were MSHA and all this, I really don't know.

THE COURT: Did you ever complain to any MSHA inspectors about any safety complaints? Ever make any complaints to them?

THE WITNESS: No.

* * * * * * *

THE COURT: Okay. Had you ever had any problems at Turner Brothers before during your employment; ever received any warnings, reprimands, or anything like that?

THE WITNESS: Never received no reprimands, no, sir.

THE COURT: Do you know any other employees at Turner Brothers that have ever been fired for making complaints?

THE WITNESS: No, sir.

Mr. Jackson stated that his ulcer condition which caused him to miss 4 days of work occurred a year and a half ago, and that his financial difficulties took place approximately a year ago (Tr. 107).

Mr. Jackson stated that his September 18, 1985, statement to MSHA contains his signature, but that he did not write it out. He stated that he could not remember who wrote t out (Tr. 110), but respondent's counsel asserted that he was informed by MSHA's counsel that Mr. Jackson's wife wrote ut the statement (Tr. 122).

Mr. Jackson stated that he has not been employed since his discharge, and that his present source of income consists of $122 a month from the Veterans' administration. He confirmed that he has received a $1,700 payment on his 10 percent

the workmen's Compensation Court claim for temporary to
disability. The question of permanent disability compe
is still pending. The temporary benefits are in connec
with Mr. Jackson's back and eye injuries. Mr. Jackson
firmed that he is in contact with his lawyers regarding
claims, and respondent's counsel stated that he is stil
ing medical evaluations from Mr. Jackson's attorney rega
his loss of hearing condition and that the matter will
heard in court within the next 3 or 4 weeks (Tr. 246-24

Allen G. Howell testified that he is an MSHA Distr
senior special investigator, and he confirmed that he c
an investigation of Mr. Jackson's complaint after obtai
prior two statements on approximately September 28, 198
Mr. Howell stated that he interviewed four complainant
nesses, three respondent witnesses, and three doctors.
tified the respondent's witnesses as Mr. Turner, Mr. Bec
Mr. Sisney (Tr. 129-131). Mr. Howell stated as follows
respect to the result of his interviews, (Tr. 131-133):

Q. Whom did you interview for the respondent?

A. I interviewed Mr. Turner, Mr. Beck, and Mr. Sisney.

Q. Were you present this morning for Mr. Jackson's testimony?

A. Yes, I was.

Q. Did you hear him testify that he had been fired for making safety complaints?

A. Yes, I did.

Q. Did he tell you that he had been fired for making safety complaints?

A. Yes, he did.

Q. In the course of your investigation, did you uncover any evidence to support the allegation that he had made safety complaints?

A. There was some inconsistency but, basically, that Mr. Jackson had made safety complaints on occasion to management. Some people said -- one of the statements was "a few times," and another one was "constantly." One of the statement was, too, that most of the complaints were founded, that there was a legitimate complaint. The other one was that 75 to 80 percent of the time his complaints was not founded, that he just didn't want to work on the machine.

A. Did you find support among the complainant's witnesses for the claimed safety complaints?

A. Yes, I did.

And, at (Tr. 136-139):

Q. What was the reason stated for the discharge of Mr. Jackson?

A. By who?

Q. By the respondent.

A. The accident.

Q. And what specifically, with respect to the accident, was the basis for the discharge?

A. The respondent contends that if anyone at the mines is involved in an accident which causes property damage to their equipment and/or delay, that that person would be discharged.

* * * * * * *

if a person was involved in an accident that damaged the company's property or it was his fault, that the person was discharged.

Q. That's your conclusion.

A. That's my conclusion. That's what I thought I was asked.

Q. Now, you mentioned -- well, possibly you were. I should be more careful. You mentioned the matter of fault. Were you told -- well, what were you told specifically by the three members of mine management was the company policy with respect to property damage?

A. I can't say specifically. I can tell you in general. Without reading their statements, I wouldn't want to try to quote anyone.

Q. Did it require culpability or negligence or fault?

A Yes, that would be one of their guidelines, in my opinion.

Q. Did anyone say that simply being involved in an accident would be enough, anyone from management?

A. I don't think in that words, no.

Q. Okay. This was stated to you as a policy, did you say?

A. Right.

Q. To the best of your knowledge, was this policy ever reduced to writing?

MR. PETRICK: I will so stipulate that it was not.

A. Yes. It was.

Q. The statement was consistent?

A. Are we talking about the respondent's witnesses?

Q. Yes.

A. Yes, their statements in regards to the policy for discharge, as far as their statements was consistent, that if the person was involved in an accident that they felt was his fault and was avoidable, it would entail a discharge.

With regard to the results of his investigation conc ing the accident, Mr. Howell testified at follows (Tr. 144-147).

Q. Okay. Did you question any of these witnesses as to the cause of the accident?

A. Yes, I did.

Q. Did you get an understanding as to what caused the accident?

A. From the complainant's witnesses I've talked to, there was no abnormal mining conditions at the mines. They hadn't had any real problems with mining in that area. There was no damaged high walls or unsafe areas that anybody was aware of, and the mining was proceeding in a normal manner at the time the accident occurred.

they didn't think that he could have been aware of it prior to it falling.

Q. What was the version of the accident given you by the respondent's witnesses?

A. That Mr. Jackson was operating in the manner in which he would normally be operating. I guess to elaborate on both their statements of management is that the responsibility is up to the operator to ensure the security of the machine and his safety while in the slot. It's his judgment to do that. On the other side when talking to the complainant's witnesses, the thing that I based my conclusions on was as to whether or not they was observing anything unusual and had taken any unusual, any extra steps, and they all stated that they hadn't, but then Mr. Jackson was the only one in that slot.

Q. Did any of the people you spoke to for the respondent assess the blame for the accident?

A. Could you rephrase that? I didn't really understand.

Q. Did anyone say that Mr. Jackson was at fault in the accident that occurred?

A. Yes. Are you talking about the respondent's witnesses?

Q. Yes.

A. Yes.

Q. What did they say?

A. I think that -- not in regards to the accident. I think the main contention of Mr. Beck was that he attempted to move the dozer after

observed the accident?

A. No, one was an eye witness to the accident.

Q. (By Mr. Moncrief) Who fired Mr. Jackson, according to your investigation?

A. Mr. Sisney.

Q. Okay. Do you know what knowledge he had when he made the decision, or announced the decision to fire Mr. Jackson, with respect to the accident and its cause?

A. Mr. Sisney said it was his decision. He told Mr. Jackson when he was taking him back to his vehicle in the truck. Conversations other than that was -- I would rather read a quote or let them tell theirself.

Q. What I'm asking you is: did he state what his decision to fire Mr. Jackson was based on?

A. The fact that he had an accident that had caused damage to the machine, and it was avoidable; it could have been an avoidable accident.

On cross-examination, Mr. Howell identified the statements he took from Mr. Beck, Mr. Sisney, and Mr. Turner during his investigation of the complaint (Exhibits R-6 through R-8). Mr. Howell confirmed that he did not ask for my information from the respondent regarding any employees who were negligent and involved in accidents but were still employed by the respondent (Tr. 178). He also confirmed that the respondent had no knowledge of Mr. Jackson's injuries until after he returned to the mine after the accident and so informed management (Tr. 181).

529. He stated that the machine had been out of service due to a fire, but that it was completely rebuilt and assigned to him. He operated the dozer on a 4-day, 12-hour a day shift, and Mr. Jackson would operate it for the next 4-day shift.

Mr. Haberland stated that he operated the dozer on the 4-day shift immediately before the shift on which Mr. Jackson was terminated, and that both doors worked properly and he had no occasion to make any safety complaint concerning the inability of the right-hand door to be opened and closed. He confirmed that he operated the machine with the doors open and that most of the time when he arrived on his shift the doors were closed (Tr. 207-209).

On cross-examination, Mr. Haberland denied that he ever told Mr. Jackson that the right door of the machine would not work, and he denied that he was aware of any MSHA investigation or that he ever spoke with Inspector Howell. He confirmed that Mr. Sisney called him the morning of the hearing and asked him to come. He also confirmed that Mr. Sisney did not ask him about the door, and he did not know why he was asked to appear at the hearing (Tr. 210-212).

Mr. Haberland confirmed that he and Mr. Jackson operated the same D-10 dozer, but denied Mr. Jackson ever discussed the condition of the right door with him. He stated that when he next operated the machine after Mr. Jackson's discharge, the glass was out of the left door, the door was dented, and the heat shield was bent. However, the right hand door was still operating properly (Tr. 214-215). He stated that Mr. Jackson operated the machine with the doors closed and the air conditioning on, while he operated it with the doors opened and the doors swing open and latched back (Tr. 216).

Robert A. Turner, testified that he is the secretary of the corporate operator Turner Brothers, Incorporated, and that he holds a B.S. degree in civil engineering from the University of Missouri and has worked in construction and mining all of his life. He explained the "slot dozing" method of mining used at the mine, including the safety precautions expected of a dozer operator while performing his duties. He stated that the machine operator has the responsibilit to watch and maintain the slop s nd when he is out

machine. Material was under the rocks, and they had falle on the machine (Tr. 221-222).

Mr. Turner stated that in his opinion the rocks came the slope because it had not been properly maintained, and confirmed that "slot dozing" has taken place at the mine w D-10 dozers since 1981. He gave the following reasons for Mr. Jackson's discharge (Tr. 223-224):

> Q. Would you tell us the reason, or reasons, for the termination of Mr. Jackson?
>
> A. Mr. Jackson was terminated for not doing his prescribed duties as a D-10 operator and that he had to maintain the slopes of his slot so that material would not fall on him. There was no evidence that he had ever been up on top of the slot immediately to the left of him and tried to maintain or look for rocks to protect himself.
>
> Q. You mean in the whole time that he was cutting that slot, he had not been up on top of there?
>
> A. There was no dozer tracks. There had not been any work with the dozer to prevent anything.
>
> Q. Did you look for those dozer tracks?
>
> A. Yes.
>
> Q. You did not observe any?
>
> A. There was none there.
>
> Q. Was there any other reason that Mr. Jackson was terminated other than what you just said?
>
> A. No, sir.

Q. You did talk with Mr. Jackson at the time, did you not?

A. He asked me if he could have another chance.

Q. Is that the extent of the conversation you had with him?

A. And I said that he'd had his chances.

Q. Any other conversation?

A. No, sir.

On cross-examination, Mr. Turner stated that when he was interviewed by Mr. Howell, he did not tell him about t matters he has testified to in this hearing because Mr. Ho did not ask. He confirmed that he did not advise Mr. Howe that Mr. Jackson had caused the damage to the dozer becaus Mr. Howell asked specific questions and he answered them. Mr. Turner denied that he fired Mr. Jackson or ordered him fired (Tr. 226).

Mr. Turner stated that after Mr. Sisney arrived on th scene he looked the machine over, took Mr. Jackson's lunch box out of it, and then took him to his car and fired him (Tr. 226). Mr. Turner stated that he did not know whether Mr. Sisney looked for any dozer tracks on the slope, but t "he looked the whole area over" (Tr. 227). He also stated follows (Tr. 227-228):

Q. So you don't know whether Mr. Sisney saw what you say is evidence to indicate that Mr. Jackson had not been maintaining the shot wall?

A. Mr. Sisney looked the whole area over.

Q. Do you know whether he looked for the dozer tracks?

A. No, sir.

that there were no dozer tracks on the shot wall, top.

A. And the way the rock was laying on the dozer, that because of the angle of repose and the way it was up as high as it was on the dozer, it had to fall out of the face and on to the dozer.

Q. Has it ever happened that a properly maintained shot wall has fallen?

A. I wasn't aware of any there.

Q. Does it ever happen?

A. Not if it's properly maintained and the operator looks for rocks and does his job.

Q. When is it that the operator is supposed to go up and lay down these tracks on the shot wall?

A. Well, if he is digging through the area where -- if you listened to what I said, there was different stratas of rocks, and there's one layer in there where this rock came out of that is normally blocky and hard to get through, and it is a problem, and if they -- when a guy works through that, he should, he goes by it for two or three hours while working, backing up his slope, maintaining his slope, and all that, and if he is doing his job and observing the wall, he should notice those.

Mr. Turner stated Mr. Jackson had worked the slot mos of the morning prior to the accident for approximately 3 hours, and except for the time that he is out of the machine, he is supposed "to keep an eye peeled to the wall as he is operating. He would have had to observe the slop

In response to further questions, Mr. Turner stated that Mr. Jackson never complained to him about safety matters, his equipment being inoperative, or problems with any of his equipment. He also stated that no complaints by Mr. Jackson ever came into his attention (Tr. 230).

Mr. Turner stated that he had previously observed Mr. Jackson operating his dozer, but that he was not his supervisor. Mr. Sisney supervised Mr. Jackson and Mr. Sisney advised him that he had to constantly motivate Mr. Jackson and had to remind him to use his seat belts, and to operate the machine properly while stacking materials with the dozer (Tr. 231).

Mr. Turner stated that his company policy calls for the immediate termination of an employee who causes an accident resulting in damage or injuries. An employee not at fault would not be terminated. The policy is verbally communicated to employees and it is not in writing or in the form of policy directives. He confirmed that employees are trained according to MSHA regulations. Equipment operators are constantly trained by company superintendents and foremen, and they are expected to do what they are trained to do (Tr. 232).

Mr. Turner stated that his company has about 300 employees. Payroll and training records are maintained at each mine. He confirmed that Mr. Jackson's discharge was not reduced to writing, and that employee discharges are not in writing because "we just don't need the paperwork" and "we've always done things kind of out of the seat of our pocket" (Tr. 234).

Mr. Turner stated that he believed Mr. Jackson knew Mr. Sisney discharged him for "tearing up a piece of equipment" because "it didn't take 20 minutes from the time that we knew that it happened for us to make up our mind and for Mr. Jackson to be terminated." Mr. Turner stated that Mr. Sisney fired Mr. Jackson because he is the superintendent and does the hiring and firing (Tr. 235).

Mr. Turner stated that after arriving at the scene of the accident and looking around, he concluded that Mr. Jackson at fault. After Mr. Sis y ed, they walked arou d

damaging company equipment. He stated that Charles Fraum discharged at the Welch Mine for backing a truck into anot truck and that MSHA investigated the matter. Randy Willis was discharged at the Claremore Mine for backing up a 992 into a pickup, and another employee at Claremore (first na Darell) was fired for backing a 992 into a truck (Tr. 237

Ronald L. Sisney testified that he is employed by the respondent as the superintendent of the Claremore Mine. H stated that after Mr. Jackson's accident he crawled into t left side of the machine over the rock to look at the dama and to remove Mr. Jackson's dinner bucket and water jug. exited the machine through the right door, and while the d was jammed or hard to open, the door latch was operable (T 237-239).

With regard to Mr. Jackson's termination, Mr. Sisney stated as follows (Tr. 239-240):

> Q. Okay. Now, with regard to the termination of Mr. Jackson, did you have a conversation with him before terminating him or at the time of termination?
>
> A. Yes, I did.
>
> Q. Where was this?
>
> A. On top of the high wall behind the dozer.
>
> Q. Did the conversation continue in your pickup truck?
>
> A. Yes, it did.
>
> Q. Did you advise Mr. Jackson as to why he was being terminated?
>
> A. Yes, I did.
>
> Q. Would you tell us, give us all the reasons you gave him for terminating him?

that time?

A. Not at that time, no.

Q. When did you first hear about it?

A. About the --

Q. Complaint of safety violations.

A. It was after the investigation, or at the time of the investigation.

Q. By Mr. Howell?

A. By Mr. Howell.

Q. Did the safety violations or the complaints of Mr. Jackson in whatever manner have anything to do with his termination?

A. No, none at all.

Q. Was there any other reason, other than the fact that you felt at that time that he was negligent, for terminating him?

A. At that particular time, that was the only reason I terminated him.

In response to further questions, Mr. Sisney stated th he could not recall Mr. Jackson ever complaining to him abo the door on his machine. He confirmed that Mr. Jackson did complain at different times about safety concerns such as t lights on his machine or cracked glass. Mr. Sisney stated that he acknowledged the complaints and tried to fix the items in question. Although he received a lot of complaint from Mr. Jackson, as well as others, he did not consider hi to be a chronic safety complainer. Mr. Sisney considered most of Mr. Jackson's complaints to be legitimate, while so were not. Mr. Sisney denied that his decision to discharge

he didn't fire him, that someone else would have fired him (Sisney). He also denied that Mr. Turner influenced his dec sion to fire Mr. Jackson, and he could offer no explanation as to why the discharge was not reduced to writing (Tr. 242)

Mr. Sisney stated that he viewed the accident area abou an hour and a half prior to the accident, and he concluded that the rock which struck the machine should have been removed while Mr. Jackson was cutting the slot. He agreed that Mr. Jackson could have concluded that the rock would no dislodge. Mr. Jackson simply told him that the rock "just fell in, just slid in" (Tr. 245). Mr. Sisney believed the accident could have been prevented.

The parties stipulated that the prior statements made b Mr. Sisney, Mr. Turner, and Mr. Beck to MSHA investigator Howell during his investigation may be incorporated by refer ence in this proceeding (Tr. 245; exhibit R-6 through R-8).

Arguments Presented by the Parties

During the course of the hearing, MSHA's counsel contended that Mr. Jackson was discharged because of his safety complaints, and that the respondent reacted and retaliated against him by discharging him. With regard to MSHA's support for its application for temporary reinstatement, counsel asserted that Mr. Yanak's supporting affidavit was based on the facts then known to the Secretary, including a summary of the statements made to special investigator Howel during his investigation of the complaint (Tr. 14-16).

Respondent's counsel took the position that Mr. Jackson was not discharged for making safety complaints, and that he was discharged for causing an accident which was his fault. Counsel asserted that the accident resulted in property damage to the respondent's equipment, and that the discharge was consistent with company policy (Tr. 16-17).

MSHA's counsel asserted that in order to support Mr. Jackson's temporary reinstatement, all that is required to be established is that the complaint has merit, and he does not have to establish that he will ultimately prevail o the merits of his complaint (Tr. 17).

the Federal Rules of Civil Procedure for temporary court orders issued pursuant to Federal Statutes. Counsel suggested that the standard to be applied in this case is whether or not the complainant can establish that there is a reasonable likelihood of success on the merits of his case (Tr. 19).

MSHA's counsel disagreed with the respondent's argument, and he asserted that the term "frivously brought" should be applied in the context of whether the complainant acted frivously in filing his complaint and not whether the complaint itself is frivolous. In the instant case, counsel asserted that the complaint has a degree of merit which establishes that it is not frivolous, but well justified and meritorious (Tr. 22-23).

At the close of MSHA's case, the respondent moved that the application for temporary reinstatement be denied on the ground that the evidence presented in support of the application is insufficient to support the complainant's temporary reinstatement (Tr. 187).

Respondent also asserted that there are compelling medical reasons for denying the complainant's temporary reinstatement. Counsel pointed out that Mr. Jackson has not demonstrated that he is physically fit and able to perform his job without subjecting the respondent to liability for additional and future injuries with respect to Mr. Jackson's hearing situation and his back, neck, body, and stomach conditions. Counsel asserted that Mr. Jackson's doctor has rated him 10 percent disabled and has also indicated in his work release report that Mr. Jackson is subject to injury in some greater degree than would normally be expected of an employee (Tr. 188). He also confirmed that Mr. Jackson's claim for permanent disability is still pending.

MSHA's counsel conceded Mr. Jackson's 10 percent permanent disability, but asserted that with the exception of his ear doctor, his other doctors have released him for work without limitation. Counsel also conceded that Mr. Jackson's disability may subject him to pain from time to time, but asserted that it would not incapacitate him or more likely subject him to injury (Tr. 190).

In response to the motion t i i s, MSHA's counsel

MSHA's counsel asserted that the facts related to the rock fall demonstrate that this was an unsafe condition and that Mr. Jackson was fired immediately following the accident by individuals who saw or knew anything but that there was a bulldozer with rocks on it.

MSHA's counsel did not dispute the fact that the respondent has a policy that culpable employees will be discharged in the event of property damage. However, counsel contended that this policy is followed as a matter of convenience in order to permit the respondent to terminate employees when there is only an inference of negligence on the employee's part. Counsel argued that the respondent has stated no basis for the determination that Mr. Jackson had any culpability in the damage to the bulldozer.

MSHA's counsel conceded that Mr. Jackson has a 10 percent disability as a result of the injuries sustained by the accident. However, counsel took the position that the fact that Mr. Jackson may have state workmen's compensation claims pending in connection with his loss of hearing, and certain back and eye injuries stemming from the accident, this is no basis for concluding that he is not physically able to return to the work he was performing prior to his discharge (Tr. 67-69). However, counsel stated that "the question of ear protection and the like is something that may be worth delving into" (Tr 67). He then suggested that Mr. Jackson may be willing to go back to work wearing ear protection, and assuming he were to "undertake whatever risk is involved, perhaps he should be allowed to do so" (Tr. 68). Counsel also asserted that "Mr. Jackson didn't say he had no compunction about operating in unsafe conditions, equipment, and was quite willing to do so" (Tr. 69).

MSHA's counsel recognized that in the event the respondent can establish that it would have fired Mr. Jackson based on a reasonable belief that his negligence caused the accident which resulted in damage to the bulldozer, regardless of any protected activity, the issue of supervening motivation would have to be resolved. However, counsel maintained that the evidence produced here does not provide a basis for concluding that Mr. Jackson was culpable, and that MSHA has met its burden (Tr. 190-193). Counsel suggested that its possi-

Findings and Conclusions

Although I cannot conclude from all of the evidence and stimony adduced during the reinstatement hearing that . Jackson's claim of discrimination is frivolous or totally cking in merit, I do conclude and find that the respondent s established that there is a serious question concerning . Jackson's physical condition and ability to perform the ties of a bulldozer operator if he were to be temporarily einstated pending the adjudication of the merits of his aim. I also conclude and find from the documentary evience presented by the respondent that the temporary reintatement of Mr. Jackson at this time will place him in a rking environment where there is a real potential for rther injury and exacerbation of his prior injuries and laimed existing loss of hearing.

In support of its argument that Mr. Jackson is physilly unable to fully perform his job, the respondent has resented documentary evidence consisting of doctor's statents and reports, and compensation claims filed by r. Jackson before a state workers compensation court. r. Jackson has apparently retained counsel to represent him those proceedings, and as of the reinstatement hearing, he claims were still pending for adjudication. MSHA's evince to the contrary consists of two recently obtained statents that Mr. Jackson is free to return to work. For the asons which follow, I have given greater weight to the tatements produced by the respondent, and little weight to e "work release" forms produce by MSHA. I believe it is vious that these forms, one of which deals with an ulcer ndition, were obtained in an effort to summarily convince e that Mr. Jackson is physically able to return to work.

There is no evidence that the doctors who executed the ork releases obtained by Mr. Jackson at the request of MSHA's unsel a day or so before the reinstatement hearing were even ware of his claimed loss of hearing due to equipment noise xposure, and MSHA's counsel conceded that the doctor's were obably unaware of the condition when they signed the release tatements. A copy of Mr. Jackson's claim filed with the

One of the work releases dated February 3, 1986, is from the doctor who treated Mr. Jackson for an ulcer condition, and a second one is from the chiropractor who treated him for his neck, shoulder and back injuries. I note that the "return to work" slip (exhibit C-1) signed by this doctor states that Mr. Jackson is able to return to work on November 5, 1985, with no restrictions. This is in direct conflict with this same doctor's discharge report of November 5, 1985, a copy of which was filed with the state workers compensation court on January 14, 1986 (exhibit R-4). That report states in pertinent part as follows:

> Mr. Jackson has suffered a severe injury of the supportive ligaments of the cervical thoracic spine, which predispose this patient to reoccuring exacerbation of symptoms and reinjury. * * * Mr. Jackson has remained temporarily and totally disabled for employment as a result of his injury which occurred on 09-09-85.

In a letter dated November 21, 1985, from the same chiropractor to Mr. Jackson's attorney, the doctor stated in pertinent part as follows:

> It is my professional opinion, from the examination findings, and this patient's severity of symptoms, that he will require periodic care for the rest of his life as a result of these injuries. He probably will experience chronic reoccurring symptoms. * * * Mr. Jackson has 10 percent permanent impairment of the whole man as the result of the injuries he sustained on the job on 09-09-85.

The testimony and evidence adduced in this case with respect to the procedure of "slot dozing" reflects that a dozer operator is constantly maneuvering his machine back and forth while cutting into the overburden, and the machine is not always on level ground. It maneuvers over grades and

matter of fact, after the accident, he had to crawl out his machine and wait for someone to arrive on the scene. Under these circumstances, and given Mr. Jackson's physi disability and prior injuries, I conclude that temporary statement to his prior job will expose him to a real pot tial for further injury.

The fact that Mr. Jackson may be willing to assume risk of further aggravating his loss of hearing, or to further injury to his back and neck, is no reason to dis his injuries and disabilities. Aside from Mr. Jackson's ical well being, the respondent has a right to protect against further liability in the event that Mr. Jackson reinjured. Simply because Mr. Jackson may be willing to place himself in further jeopardy, or is willing to work under conditions which he knows are unsafe, is no justi tion for granting temporary reinstatement.

Mr. Jackson has candidly admitted that he has in th past exposed himself to unsafe work conditions, but con to work because of his opinion that he would lose his jo he did otherwise. Respondent presented testimony that Mr. Jackson has been cautioned in the past about the use seat belts and wearing his hard hat on the job. Under circumstances, I believe one may reasonably assume that the event Mr. Jackson were to be temporarily reinstated will again take further risks which may lead to disastr results. Even if Mr. Jackson did not take such risks, his disability and injuries as reflected in the medical mentation adduced during the hearing, the potential for further injury while operating a bulldozer is real and ent and cannot be discounted.

Although I recognize that Mr. Jackson is not prese gainfully employed, in the event he prevails on the mer his discrimination complaint, he will be entitled to be whole and to receive back-pay. However, I cannot in go conscience disregard the consequences which may result his temporary reinstatement at this time, nor can I dis the attendant potential liability to the respondent for stating an employee with known physical conditions or i ments which resulted from injuries suffered in the cour his prior employment.

George A. Koutras
Administrative Law Judge

stribution:

ederick W. Moncrief, Esq., Office of the Solicitor, U.S.
partment of Labor, 4015 Wilson Boulevard, Arlington, VA
203 (Certified Mail)

bert Petrick, Esq., North Highway 69, P.O. box 447,
skogee, OK 74402 (Certified Mail)

March 19, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. LAKE 85-67-M
v.	:	A.C. No. 20-00608-0551
	:	Michigan Silica Company
MICHIGAN SILICA COMPANY, FORMERLY KNOWN AS OTTAWA SILICA COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal f the petitioner against the respondent pursuant to sectio of the Federal Mine Safety and Health Act of 1977, 30 U. § 820(a), seeking a civil penalty assessment in the amou $500 for a violation of section 105(c)(1) of the Act. T respondent contested the alleged violation and proposed penalty, and the case was docketed for a hearing on the However, the parties have now submitted a proposed settl pursuant to 29 C.F.R. § 2700.30, and the respondent has to pay $250 for the violation in question.

The violation in this case is the result of a discr complaint filed by MSHA against the respondent in 1981. decision upholding the complaint was issued on June 3, 1 4 FMSHRC 1013, and on appeal it was affirmed by the Comm at 6 FMSHRC 516 (March 1984). On November 11, 1985, the Court of Appeals for the Sixth Circuit affirmed the Comm decision that the respondent violated section 105(c)(1) Act, Secretary of Labor v. Michigan Silica Company, Forr

this case, the parties assert that they wish to settle the
in order to avoid the additional expense of litigation. I
that the respondent has already incurred great expenses in
litigation of the case and has paid in excess of $40,000 fo
wages and other benefits to the employee who was ordered re
stated to his job.

After careful and further consideration of this matter
conclude and find that the proposed settlement is reasonabl
in the public interest. Accordingly, pursuant to 29 C.F.R.
§ 2700.30, the settlement IS APPROVED, and the petitioner's
motion seeking my approval IS GRANTED.

ORDER

The respondent IS ORDERED to pay a civil penalty in th
amount of $250 for the violation in question. Payment is t
made to MSHA within thirty (30) days of the date of this de
and order, and upon receipt of payment, this matter is dism
The hearing scheduled for April 10, 1986, is cancelled.

George A. Koutras
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Depa
of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL
60604 (Certified Mail)

Robert Oren, Vice President, Industrial Relations, Michigan
Silica Company, P.O. Box 577, Ottawa, IL 61350 (Certified M

/fb

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On Behalf of BARRY L. WEAVER, Complainant	:	Docket No. CENT 85-99-D
	:	Alpine No. 4/7 Mine
v.	:	Jerrett Canyon Project
ALPINE CONSTRUCTION COMPANY, Respondent	:	

DECISION AND ORDER APPROVING
SETTLEMENT AND DISMISSING PROCEEDING

Before: Judge Lasher

The parties have reached an agreement in the above proceeding, the intent of which is to settle all of Complain claims. Pursuant thereto, Respondent, without admitting a violation, agrees to pay Barry L. Weaver the sum of $3,746.6 back wages and interest, Mr. Weaver waives any right to re- instatement and to reapply for employment with Respondent, a the Secretary waives assessment of a civil penalty.

The settlement appearing reasonable and just in the premises, the same is approved.

ORDER

(1) On or before 30 days from the date hereof, Respond shall pay Barry L. Weaver the sum of $3,746.68.

(2) This proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

Edmondson, Esq., 416 Court Street, P.O. Box 11, Muskogee, OK
402-0011 (Certified Mail)

pine Construction Company, P.O. Box 339, Stigler, OK 74462
ertified Mail)

olc

Petitioner	:	A.C. No. 39-00055-05551 A
	:	
v.	:	Homestake Mine
	:	
JOSEPH CRACCO,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to Section 110(c) the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c).

Prior to a hearing, the petitioner filed a motion seekin approval of a settlement agreement entered into by the partie

1. The agreement reflects that at all times mentioned herein respondent was acting as master ropeman and foreman at gold mine operated by the Homestake Mining Company in Lead, S Dakota.

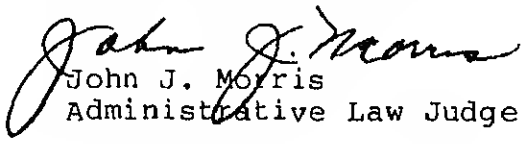
2. On July 25, 1984 MSHA issued Citation 2097234 agains the corporate mine operator alleging a violation of 30 C.F.R. § 57.15-5. Subsequently, the corporate operator paid a civil penalty of $8,000 for the foregoing violation.

3. Thereafter, MSHA charged respondent with having knowingly authorized, ordered or carried out the corporate mi operator's violation as an agent of said operator. A civil penalty of $1,000.00 was proposed.

4. Subsequently, respondent proposed that the case be settled for the amount of $750.

5. In mitigation petitioner states that respondent had acting as a temporary foreman for only a short period of time Under these circumstances and in consideration of the criteri contained in Section 110(i) of the Act I find that the propos settlement is reasonable and in the public interest.

3. A civil penalty of $750 is assessed.



John J. Morris
Administrative Law Judge

ribution:

hilip Smith, Esq., Office of the Solicitor, U.S. Department
abor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified
)

ert A. Amundson, Esq., Amundson, Fuller & Delaney, 203 West
Street, P.O. Box 898, Lead, SD 57754 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 85-69
	:	A.C. No. 34-01404-03505
v.	:	
	:	Docket No. CENT 85-70
RICHARDS COAL COMPANY, and	:	A.C. No. 34-01404-03506
	:	
MYLU COAL COMPANY, INC., Respondents	:	Taft No. 1 Mine
	:	

SUMMARY DECISIONS AND ORDERS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed b the petitioner against the respondents pursuant to section 11(of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of $2(for three alleged violations of certain mandatory standards found in Parts 50, 71, and 77, Title 30, Code of Federal Regulations.

The proposed civil penalty assessments were mailed to the respondents by the petitioner on May 28, 1985. However, the respondents have failed to file any answers, and subsequent orders requiring them to answer have been returned by the post service as undeliverable.

By letter dated March 13, 1986, petitioner's counsel adv me that she was informed by the MSHA Subdistrict Office in McAlester, Oklahoma, that the Mylu Coal Company was the unsuc cessful successor of the Richards Coal Company and that the m has been abandoned since at least July, 1985. Counsel also advised that all mobile equipment has been removed from the property and the mine has been placed in a nonproducing statu

the circumstances, I conclude and find that the respondents are in default, and that these proceedings may be disposed of pursuant to the Commission's summary disposition procedures pursuant to 29 C.F.R. § 2700.63.

ORDER

In view of the respondents default, and pursuant to the provisions of 29 C.F.R. § 2700.63(b), the respondents are joint and severally assessed civil penalties for the violations in question, as follows:

CENT 85-69

Citation No.	Date	30 C.F.R. Section	Assessment
9947390	11/27/84	71.802	$ 106

CENT 85-70

Citation No.	Date	30 C.F.R. Section	Assessment
2218437	12/19/84	50.30(a)	$ 20
2218639	1/7/85	77.1701(a)	$ 74

The respondents ARE ORDERED to pay the civil penalties in the amounts shown above for the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of these decisions and order.

George A. Koutras
Administrative Law Judge

Distribution:

Jill Klamm, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Rick Curry, Officer in Charge of Safety and Health, Mylu Coal Com any, Inc., 1218 Foxcroft Circle No. 7, Muskogee, OK

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 85-156-M A.C. No. 02-01398-05502
v.	:	Reidhead Sand & Rock, Inc.
REIDHEAD SAND & ROCK, INC., Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solic
U.S. Department of Labor, San Francisco,
California,
for Petitioner.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety ar
Health Administation, (MSHA), charges respondent with violat
safety regulations promulgated under the Federal Mine Safety
Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits to
place in Phoenix, Arizona on January 29, 1986.

Respondent failed to appear at the hearing and further
failed to reply to an order to show cause issued after the
hearing.

Summary of the Case

Gary Day, an MSHA supervisory mine inspector since 1975
inspected respondent on March 28, 1985 (Tr. 3).

On that occasion he observed that a 16 foot wide roadwa
ramp, lacked berms or guards. The ramp provides the only ac
to a dump hopper; further, it was elevated on a repose of ze
five feet (Tr. 5, 8).

A ten foot wide front-end loader travels the ramp to du
material into the hopper (Tr. 5). The loader, which weighed

Inspector Day further observed that there was no handrai serve as a guard for the conveyor. In addition, there was no emergency stop cord device along this waist high walkway whic was adjacent to the rollers of the conveyor (Tr. 9, 10). Var workers use the walkway to service and inspect the conveyor (10).

The foregoing facts caused the inspector to issue Citati 2087474 for a violation of 30 C.F.R. § 56.9007. The cited regulation provides as follows:

> Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Discussion

The facts establish a violation of each regulation.

There were no berms or guards on the outer edges of the elevated roadway. Accordingly, the initial citation was prop issued.

Concerning the second citation: the evidence establishes that the conveyor along part of its walkway was unguarded. I addition, the walkway lacked an emergency stop device or cord

The citations should be affirmed.

Civil Penalties

The criteria to assess civil penalties is set forth in Section 110(i) of the Act, now 30 U.S.C. § 820(i). It provid as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's histo of previous violations, the appropriateness of such penalty t the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting t

that the imposition of a penalty would not impair the operato ability to continue in business (Tr. 8). The operator was negligent since both of the violative conditions were open an obvious. The gravity of each violation was high since a fata could result; however, the inspector indicated that it was "reasonably unlikely" that an accident would occur.

The Secretary argues that the Commission should not be bound by MSHA's characterizations of the violations as non S Therefore, it is asserted that the automatic twenty dollar penalty as proposed here is not appropriate (Tr. 13, 14).

I agree that the Commission is not bound by the MSHA for Sellersburg Stone Company v. FMSHRC, 736 F.2d 1147, 1152 (7th Cir. 1984). However, in this case the evidence indicates the exposure to the loader operator was minimal. The loader only traveled 25 to 30 feet to where it dead-ended into the hopper In connection with the unguarded conveyor, I note there was a handrail which served as a guard on a portion of this walkway Apparently only a small portion was unguarded.

On balance, I deem that the proposed penalties are appropriate.

Conclusions of Law

Based on the entire record and the factual findings made the narrative portion of this decision, the following conclus of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.9022 and § 56.900

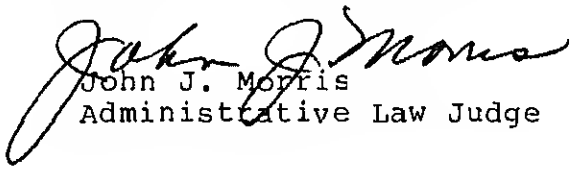
3. The citations and the proposed civil penalties there should be affirmed.

ORDER

Based on the foregoing facts and conclusions of law I en the following order:

1. Citation 2087473 and the proposed penalty of $20 are affirmed.

.n 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

ribution:

nall P. Salzman, Esq., Office of the Solicitor, U.S. Depart-
of Labor, 11071 Federal Building, 450 Golden Gate Avenue,
Francisco, CA 94102 (Certified Mail)

nead Sand and Rock, Inc., Mr. Jack Zellner, General Manager,
Box 7, Taylor, AZ 85938 (Certified Mail)

DISCIPLINARY PROCEEDING : DOCKET NO. D 86-1
:

DECISION

Appearances: Timothy W. McAfee, Esq., Norton, Virginia; James B. Leonard, Esq., Arlington, Virginia for the Secretary of Labor.

Before: Judge Merlin

This disciplinary proceeding is before me pursuant to orc of the Commission dated January 8, 1986. A hearing was held c March 7, 1986.

The matter was initially referred to the Commission pursu to Commission Procedural Rule 80, 29 C.F.R. § 2700.80 1/ for

---

1/ Rule 80 provides in pertinent part:

> Standards of conduct; disciplinary proceedings.
>
> (a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.
>
> (b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission....
>
> (c) Procedure. ... [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that

Health Act of 1977.

On July 10, 1985 Judge Koutras issued a Notice of Hearing Secretary of Labor v. White Oak Coal Company, (Docket No. VA 21) which was a civil penalty proceeding under the Federal e Safety and Health Act of 1977 The notice concluded with following instruction:

> Any proposed settlements filed later than the ten-day period noted above will be rejected and the parties will be expected to appear at the scheduled trial of the case.

Mr. McAfee was not engaged as counsel for the operator until er July 10. But he was in the case on August 12 when he sent ge Koutras the operator's response to the Secretary's Request Admissions.

On August 30 Mr. McAfee and Mr. Mark R. Malecki, the Solici- representing the Secretary of Labor, instituted a conference l with Judge Koutras. Pursuant to request of counsel Judge tras continued the hearing for several weeks and changed the ring site. Mr. McAfee testified at the disciplinary hearing t prior to the conference call he was told by Mr. Malecki ut the Judge's 10-day requirement (Tr. 9-10). Also at the ciplinary hearing, Mr. Malecki described the discussion of the -day requirement during the conference call itself (Tr. 32). September 3 and September 24, Judge Koutras issued amended ring orders scheduling the hearing for October 3 in Ouffield, ginia. Mr. McAfee received copies of these orders. He also eived from the Judge a letter dated September 10, enclosing a ter the Judge had received from the operator. On October 2 day before the scheduled hearing, Mr. McAfee and Mr. Malecki in the former's office to discuss the case. On that occasion Malecki told Mr. McAfee he thought it was too late for a tlement in view of the Judge's 10-day requirement (Tr. 23, 30). dge Koutras was mentioned by name (Tr. 30).

On the day of the hearing, October 3, at 7:30 a.m., the rator telephoned Mr. McAfee advising that he would pay penalty of $500 proposed by the Mine Safety and Health Ad- istration (MSHA), and would not come to the hearing. McAfee then telephoned Mr. Malecki and told him that the rator was willing t pay MSHA's proposed penalt and th t in

On the next day, Judge Koutras issued an order directing Mr. McAfee to show cause within 10 days why he should not be referred to the Commission for disciplinary action pursuant to 29 C.F.R. § 2700.80 for his failure to appear at the hearing and for his failure to advise the presiding Judge that he would not appear. In his response filed October 17, Mr. McAfee stated that at the time the operator telephoned him on October 3 he did not have the file which reflected who the administrative law judge was and only knew where the Solicitor was staying. In the cover letter to his response Mr. McAfee asked Judge Koutras what disciplinary rule he had violated so he could further respond to the show cause order. On the same day Judge Koutras replied, citing 29 C.F.R. 2700.80(c) and giving Mr. McAfee a copy of the Commission's decision in Disciplinary Proceedings, 7 FMSHRC 623 (1985). The Judge gave Mr. McAfee an additional 10 days to respond, stating as follows:

> The purpose of the show-cause order is to afford you an opportunity to explain your failure to appear at the scheduled hearing in this matter, or to advise me that you would not appear. Upon receipt of your reply, I will then determine whether or not to refer the matter to the Commission for possible disciplinary action pursuant to its rules.

Mr. McAfee did not respond further and, as already noted, Judge Koutras referred the matter to the Commission in his decision dated December 4, 1985.

In his petition to the Commission, Mr. McAfee again stated that on the morning of October 3 he did not know the name of the Judge and asserted that any implication to the contrary was unfounded.

It is difficult to accept Mr. McAfee's assertion that on October 3 he did not know Judge Koutras' name. Between August 30 and October 3 he participated in a telephone conference call with the Judge and received two orders and a letter from him. And on the day before the hearing Judge Koutras was referred to by name in the meeting Mr. McAfee had with Mr. Malecki. But even accepting Mr. McAfee's proferred excuse and viewing this aspect of the matter in the light most favorable to him, he could have ob-

-day requirement. At the meeting on the day before the aring, Mr. Malecki told Mr. McAfee he thought it was already o late for a settlement in light of the 10-day requirement (Tr.). And when Mr. McAfee spoke with Mr. Malecki on the morning October 3, Mr. Malecki expressed the view that Judge Koutras uld not approve the settlement and that he would have to put on s case (Tr. 33). At this point, both counsel were speaking out a settlement of $500, MSHA's proposed penalty. Accordgly, on the morning of October 3 Mr. McAfee knew that despite e operator's willingness to pay $500, his appearance was quired and a good chance existed the hearing would go forward. vertheless, Mr. McAfee deliberately chose to disregard the dge's orders and did so without bothering to personally notify n.

At the disciplinary hearing, Mr. McAfee stated he was unare that a Commission Judge does not have to accept a proposed ttlement even if it is for MSHA's proposed amount (Tr. 13). is asserted lack of knowledge is rejected in view of the advice . McAfee received from Mr. Malecki that the hearing would proly go on despite operator acceptance of the $500 penalty. In y event, such ignorance, even if true, cannot justify the ilure to appear. As an attorney undertaking to act in cases der the Mine Safety Act, Mr. McAfee can be expected to be consant with one of the most elementary principles governing ese proceedings, i.e., the Judge's de novo authority in penalty ses. Sellersburg Stone Company v. Federal Mine Safety and alth Review Commission, 736 F.2d 1147 (7 Cir. 1984). In this se after the hearing at which only the Solicitor appeared, the dge issued a decision exercising his de novo authority and sessing a penalty of $600. No appeal was taken. Of course, e does not know what would have happened if Mr. McAfee had peared and cross-examined MSHA's witnesses. But he certainly d his client no service by his absence, leaving the Judge to cide the matter on a one-sided record.

Moreover, after being advised at the disciplinary hearing of e Judge's de novo authority in penalty cases, Mr. McAfee pressed no regret for his ignorance of applicable law or for s failure to appear, but rather stated that it was "disturbing" him that a Judge would act the way Judge Koutras did. . McAfee consistently has denied any responsibility and instead criticized the Judge. In his petition to the Com-

any more to tell him" (Tr. 19).

Mr. McAfee's criticism of the tone of Judge Koutras' orders and letter is unfounded (Tr. 19). If the orders and letter indicate anything, it is that the Judge was giving Mr. McAfee every chance to explain his failure to appear. Insofar as "tone" is concerned, Mr. McAfee's written responses and oral testimony demonstrate irritation and impatience.

As an attorney appearing before a Commission Judge, Mr. McAfee was bound not to disregard any of his orders or rulings. Oisciplinary Rule 7-106 of the Code of Professional Responsbility. But far from showing any sense of obligation to comply with the Judge's orders Mr. McAfee's lack of respect is evident from his statement at the disciplinary hearing:

> "Well, I'll be happy to submit this to the Virginia State Bar and allow them to discipline me as they see fit. But I don't feel like I've violated any disciplinary rule or any ethetical [sic] consideration" (Tr. 20).

In addition to his refusal to acknowledge his professional obligations, Mr. McAfee also fails to understand that this Commission like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it. Polydoroff v. I.C.C., 773 F.2d 372 (O. C. Cir. 1985). It would be impossible for the Judges of this Commission to function if, as in this case, their orders were ignored with impunity and they themselves were held in such low regard by attorneys who practice before them.

In addition, Commission Judges travel at public expense to hearing sites convenient to the parties 29 C.F.R. § 2700.51. That is what the Judge did in this case and Mr. McAfee knew it. But this factor obviously meant nothing, and as the record of the disciplinary hearing discloses, still means nothing to Mr. McAfee (Tr. 17-18).

The mere fact of counsel's absence from the hearing would not warrant disciplinary action if the absence resulted from good cause or excusable neglect. Thyssen Inc. v. S/S Chuen On, 693 F.2d 1171 (5 Cir. 1982). In light of the circumstances set forth herein, I find that there was no good cause or excusable neglect

as explained to him at length. But even then, he did not gize or express regret either for his lack of knowledge or is failure to appear. Throughout, his attitude toward this ssion and the Judge has been one of contempt and defiance.

In light of the foregoing, attorney Timothy W. McAfee is y REPRIMANDED and is hereby SUSPENDED from practicing before Commission for a period of 60 days for unprofessional ct in deliberately failing to appear at a hearing duly uled pursuant to orders of an Administrative Law Judge of ommission.

Paul Merlin
Chief Administrative Law Judge

ibution:

B. Leonard, Esq., Office of the Solicitor, U. S. Department bor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 ified Mail)

R. Malecki, Esq., Office of the Solicitor, U. S. Department bor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 ified Mail)

hy W. McAfee, Esq., Cline, McAfee & Adkins, Professional Building, 1022 Park Avenue, N.W., Norton, VA 24273-0698 ified Mail)

erry Deel, Route 2, Box 54, Haysi, VA 24256 (Certified

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI
	:	Docket No. CENT 85-129
	:	A.C. No. 41-03217-0550
	:	
	:	Docket No. CENT 86-14-I
WHITNEY SAND & GRAVEL INCORPORATED, Respondent	:	A.C. No. 41-03217-0550
	:	Whitney Sand & Gravel Incorporated

DECISIONS

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dal Texas, for the Petitioner;
John E. Agnew, Esq., Carter, Jones, Mage Rudberg & Mayes, Dallas, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment civil penalties filed by the petitioner against the res dent pursuant to section 110(a) of the Federal Mine Saf and Health Act of 1977. The petitioner seeks civil pen assessments for three alleged violations of certain man safety standards found in Part 56, Title 30, Code of Fe Regulations, and one violation of the reporting require 30 C.F.R. § 50.30(a).

The respondent filed timely answers to the petitio proposals, and a hearing was conducted in Dallas, Texas parties waived the filing of posthearing arguments or b but I have considered any oral arguments made on the re

into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The respondent agreed that its plant is a "mine" within the meaning of the Act, and it agreed that the plant and the company are subject to MSHA's enforcement jurisdiction, and to the jurisdiction of the Mine Safety and Health Review Commission.

Discussion

Docket No. CENT 85-129-M

Section 104(a) "S&S" Citation No. 2240701, February 14, 1985, cites an alleged violation of 30 C.F.R. § 56.12025, and the condition or practice is stated as follows: "The wet process screening plant was not grounded in that there was no low impedance path back to the electrical source which supplies power to all plant drive motors. Employees are required to come in contact with the plant equipment during operation."

Section 104(a) "S&S" Citation No. 2240702, February 14, 1985, cites an alleged violation of 30 C.F.R. § 56.12028, and the condition or practice is stated as follows: "Continuity and resistance of grounding systems test has not been performed at this plant."

Docket No. CENT 86-14-M

Section 104(a) Citation No. 2241214, September 9, 198 cites an alleged violation of 30 C.F.R. § 50.30(a), and th condition or practice is described as follows: "The opera had failed to submit Form 7000-2 Quarterly Employment and Production Reports for the First and Second Quarters of FY 1985 as required."

Testimony and Evidence Adduced by the Petitioner

Docket No. CENT 85-129-M

MSHA Inspector Michael Sanders testified as to his ba ground, training, and experience and he confirmed that he been employed as an inspector since 1977. He confirmed th he conducted inspections at the respondent's plant on February 14, and August 11, 1985. He described the respon dent's operation as a sand processing plant. He stated th sand is mined from an open pit by use of a drag line. The sand is loaded and processed through a series of conveyors and it is screened, washed, sized, and stockpiled for late transportation. The plant employs approximately seven to nine people and operates 5 or 5-1/2 days a week, and one daily 8-hour shift.

Mr. Sanders identified exhibits P-1 through P-6 as ph graphs of the plant and some of the equipment which he too week or so prior to the hearing. He stated that the sourc for all electrical power for the plant is depicted in exhi P-2, and that the electrical lines are routed to the elect cal control center shown in exhibit P-1. This control cen serves as the "electrical nerve center" for the electrical equipment such as conveyor drive motors, screens, shakers, and conveyor belts.

Mr. Sanders stated that all of the electrical boxes f the plant equipment are located in the control center shed The plant was down at the time of his inspection, and he determined that the plant was not properly grounded by sim opening the electrical boxes and observing the absence of ground wire providing a low impedance electrical path back the eletrical source. He did observe a properly grounded water pump which had recently been installed.

Mr. Sanders stated that the plant and the equipment is marily of steel construction and that it normally operates 440 volts of power. He believed that the lack of proper ounding posed a hazard of electrical shock. In the event an electrical short circuit in the plant wiring, there is otential for "live circuits." In the event someone ched the equipment or otherwise contacted it, he could eive a shock. The lack of proper grounding, the presence standing water, and the fact that the number 1 and 2 eens are always wet increased the potential shock hazards.

Mr. Sanders stated that the plant operator, as well as or three other employees, would be exposed to the hazard shock or electrocution. He also stated that when the nt was originally installed and wired, it was not wired rectly. He conceded that prior MSHA inspections did not ult in any prior violations for the lack of proper unding.

Mr. Sanders confirmed that the respondent did not origi-ly install or wire the plant equipment, and it took over operation of the plant from a previous owner in March, 4. He also confirmed that it took him 15 to 30 minutes ing his inspection to detect the violation, and that the pondent eventually corrected the condition by completely iring the plant and installing ground wires on all equip-t and motors. This was a major project, but he did not w how much it cost to properly wire the plant.

Mr. Sanders stated that he issued Citation No. 22040701 ause of the lack of proper grounding for the plant wiring. used no testing devices to support the violation, and ied on his visual observations of the control boxes.

On cross-examination, Mr. Sanders stated that the "other ivalent protection" language provided for in section 12-25, could be the isolation of the electrical circuits. hough wire insulation provided a measure of protection, he not believe that the use of such insulation in and of self could serve as "equivalent protection."

required by mandatory standard section 56.12-28. He stated that plant foreman Murphy had no knowledge that the test had been done and he could not produce the test records when asked.

Mr. Sanders stated that the hazards resulting from the failure to conduct the required tests are the same as those resulting from the previous violation No. 2240701. Had the test been conducted annually as required by the standard, the lack of proper grounding would have been detected.

Mr. Sanders stated that the violation was abated after the respondent retained a knowledgeable independent contractor to conduct the test, and after the records of the test were retained at the plant office. Mr. Sanders confirmed that he reviewed the test results and was satisfied that compliance had been achieved. He also confirmed that he left written instructions with foreman Murphy as to how to conduct the required ohm resistance test.

Docket No. CENT 86-14-M

Citation No. 2241058

Inspector Sanders testified that he issued the violation after finding inadequate foot brakes on an Allis-Chalmers front-end loader being operated at the plant. The loader was used to clean up and load materials, and other trucks were operating in the vicinity of the loader. Mr. Sanders stated that he asked the loader operator to drive the loader in a

and the foreman were also there. He also believed the loader was operated on ramps and elevated roads.

Mr. Sanders believed that the loader was removed from the property and replaced by a new one, and he confirmed that he issued a combination 104(a) citation and 107(a) imminent danger order in order to insure the removal of the loader from service.

On cross-examination, Mr. Sanders confirmed that plant foreman George Hart informed him of the inadequate brake condition on the loader prior to his inspection of the vehicle. He stated that Mr. Hart told him that he had limited the operation of the loader to level ground and that it could be stopped by use of the parking or hand brake. Mr. Hart also advised him that he had requested a mechanic to perform maintenance on the truck. Mr. Sanders stated that he observed the loader stopping and loading trucks (Tr. 7-77).

Citation No. 2241214

The respondent conceded and admitted that it failed to file the first and second quarter FY 1985 reports as required by mandatory reporting regulation 30 C.F.R. § 50.30(a). Under the circumstances, the inspector who issued the violation was not called to testify (Tr. 79).

Respondent's Testimony and Evidence

Citation No. 2241214

Wayne Roberts, testified that he is employed by the respondent as its controller, and he confirmed that it was his responsiblity to file the quarterly reports in question. He stated that he delegated this responsibility to one of his secretaries who was subsequently fired for not doing her job. He later learned that the secretary had not filed the reports and the un-filed forms were found among her unfinished work on her desk. After he discovered that they had not been filed, he filed them immediately.

George K. Hart, plant foreman, testified that he informe Inspector Sanders about the lack of adequate foot brakes on the front-end loader before he began his inspection. Mr. Har stated that the brakes had "gone bad" 2-days prior to the inspection and that he had reported the condition to a mechanic who was supposed to repair them.

Mr. Hart stated that the loader operator was an experienced operator, and he instructed him to operate the loader on level ground and to restrict its operation to the stock pile area loading sand on the trucks. Mr. Hart stated further that the loader was the only one available at the plant and that its use with inadequate foot brakes was only a temporary measure. There was no foot traffic in the area where the loader was operated, and Mr. Hart estimated that it operated at a speed of 1 or 2 miles an hour. He stated that the loader could be stopped by means of the hand brake or parking brake, and that during the time it was operated with inadequate foot brakes, no harm or damage was done.

Mr. Hart stated that he told Inspector Sanders about the condition of the loader so that he would know that the loader was needed to be used until a replacement loader was received A replacement loader had been ordered and it arrived a day or two after the citation was issued.

On cross-examination, Mr. Hart stated that the loader was fueled once a day at the end of the shift. He also believed that oil would be added at least once a day. The fueling and oiling took place at the storage shack area, and he indicated that the loader would be driven around the sand stock pile areas and not on the main plant road. He also indicated that the loader operator would park the loader approximately 30 minutes before the other plant employees ended their shift, and he denied that anyone on foot was exposed to any hazard.

Mr. Hart stated that the loader operator and other employees were notified about the condition of the loader, and he believed that it could be safely operated under the controlled circumstances under which it was operated (Tr. 84-104).

able. He stated that the respondent was in the process dering a new loader, and that the maintenance operation echanic who worked on the equipment were located in s. The mechanic had to travel to the plant site to per- maintenance, and Mr. Marriot did not know whether the nic had been informed about the conditions of the brakes 105, 107). He stated that it is not company policy to te equipment without operable foot brakes because "it's st the law" and "a danger to everyone" (Tr. 106, 107).

Mr. Marriot stated that the electrical wiring system for lant has been in place since approximately 1983, when he ased the operation from S&S Sand and Gravel. He stated er that he has experienced no problems with the system, hat after the grounding citation was issued substantial was performed to install ground wires at an approximate of $4,000 to $5,000, and compliance was achieved within ext month of the issuance of the citation (Tr. 109).

Mr. Marriot stated that he has instituted procedures for g employees aware of MSHA's compliance requirements, and he issues internal citations to employees who violate y regulations. After three citations, an employee is ct to discharge. He also stated that he has begun a m of personal inspection of the operation to insure that afety regulations are complied with (Tr. 109-110).

In response to further questions, Mr. Marriot stated there were problems with the loader in question and that ew loader was ordered because of these problems (Tr.

Inspector Sanders was recalled as the Court's witness, e testified that he had no reason to question Mr. Hart's tions that he was aware of the loader brake condition d instructed the operator to use it under "controlled tions." Mr. Sanders conceded that he was aware of this he issued the citation (Tr. 114). He confirmed that at ime of his inspection he did not speak with the loader tor, nor did he determine how much vehicular traffic was e area where the loader was operating (Tr. 115).

Mr. Sanders stated that he considered the loader cita-

Findings and Conclusions

Docket No. CENT 85-129-M

Citation Nos. 2240701 and 2240702 - Fact of Violation

The respondent conceded that the plant was not grounded in accordance with the requirements stated in mandatory standard 30 C.F.R. § 56.12025 (Tr. 125). Although the respondent suggested that the insulation on the plant wiring provided an "alternative" means of compliance and provided an equivalent means of protection, no credible testimony or evidence was produced to establish this as a defense. Accordingly, this argument is rejected.

Mandatory standard 30 C.F.R. § 56.12025, requires that all metal enclosed or encased electrical circuits be grounded or provided with equivalent protection. In this case, the evidence established that the cited drive motors in question were not grounded in accordance with MSHA's requirements pursuant to section 56.12025, nor is there any credible evidence that equivalent protection was provided. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and Citation No. 2240701 IS AFFIRMED.

Mandatory standard 30 C.F.R. § 56.12028, requires that the electrical grounding system in question be tested immediately after installation, and annually thereafter. Inspector Sanders testified that he issued the citation after finding no evidence that the system had ever been tested. The plant foreman had no knowledge as to whether any of the required tests had ever been made, and the respondent produced no records to establish that any tests had ever been made. While it is true that the system was in place when the respondent acquired the plant from the previous owner in 1983, there is no evidence that it ever conducted any annual tests subsequent to that time as required by the standard. Under the circumstances, I conclude that a violation has been established, and Citation No. 2240702, IS AFFIRMED.

and the citation IS AFFIRMED.

Citation No. 2241058 - Fact of Violation

The respondent conceded that the cited loader was operated with inadequate foot brakes (Tr. 119), and the evidence establishes that the respondent was aware of the fact that the foot brakes were inoperable. The respondent's defense is that the loader was only operating in a "controlled environment," and that a new loader was on order to replace the one that was cited. Respondent also asserted that a mechanic was scheduled to repair the cited loader the day after the citation was issued, but did not appear (Tr. 118).

Mandatory standard 30 C.F.R. § 56.9003, requires that all powered mobile equipment be provided with adequate brakes. The evidence in this case established that the foot brakes on the cited loader would not stop the machine when tested on level ground. I conclude and find that the brakes were not adequate and that the petitioner has established a violation by a preponderance of the credible testimony and evidence adduced at the hearing. Accordingly, the violation IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The record establishes that the respondent is a small mine operator employing approximately seven to nine people in the operation of a sand processing plant. I conclude and find that the civil penalties assessed by me for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Exhibits G-8, are two computer print-outs reflecting the respondent's prior compliance record for the periods August 15, 1983 through August 14, 1985, and February 14, 1983 through February 13, 1985. The citations listed on the second print-out are also included on the first one. Accordingly, I have considered only the first listing which

dent has been assessed civil penalties in the amount of $4,589, for the listed violations, and that it has made civil penalty assessment payments in the amount of $2,188 through August 14, 1985.

During the course of the hearing, Inspector Sanders stated that the respondent has been previously charged with "many more" violations for defective brakes on its equipment (Tr. 122). Mr. Sanders stated that it was his "recollection" that he issued two additional orders for defective brakes at the time of his inspection, but since he did not bring his file to the hearing, he could not substantiate this (Tr. 123). The print-out reflects two prior section 107(a) orders for violations of mandatory standard section 56.9003, for which the respondent paid $1,200 in civil penalty assessments ($600 for each order). Mr. Sanders believed that these prior violations concerned a different loader and a haul truck (Tr. 124).

I conclude and find that the respondent's overall compliance record is not such as to warrant any additional increases in the civil penalty assessments made by me in these proceedings. However, in view of the two prior imminent danger orders for inadequate brakes on its mobile equipment, I believe that the respondent needs to pay closer attention to its equipment maintenance program, particularly with respect to the brakes on its mobile equipment. I have taken these prior violations into account in assessing the civil penalty for the brake violation which has been affirmed in Docket No. CENT 86-14-M.

Good Faith Abatement

I conclude and find that all of the violations were subsequently abated in good faith by the respondent.

Gravity

I conclude and find that reporting violation (No. 2241214 was non-serious. I conclude and find that the grounding citation (No. 2240701) and the testing violation (No. 2240702) wer both serious violations. Failure to ground the electrical cir cuits in question presented a shock hazard to mine personnel. Had the respondent conducted the required tests, there is a strong probability that it would have detecte th lack of

ated with inadequate foot brakes for at least 2-days
r to the inspection.

gence

I conclude and find that the grounding, testing, and
rting violations all resulted from the respondent's fail-
o exercise reasonable care, and that this amounts to
nary negligence.

With regard to the braking violation, the evidence estab-
es that the plant foreman was aware of the fact that the
er foot brakes were inadequate and that the machine was
peration with inadequate brakes for at least 2-days prior
ne inspection. Under the circumstances, I conclude and
that the violation resulted from a high degree of negli-
e on the part of respondent bordering on gross negligence.
ver, in mitigation, I have considered the fact that the
val of the loader from operation would have effectively
down this small operator's operation, that the hand
es and parking brakes could stop the loader on level
nd, and that the foreman instructed the loader operator
estrict the operation of the loader to an area with the
t possible exposure to accident or injury and so advised
inspector at the time the violation was issued.

ficant and Substantial Violations

Inspector Sanders testified that the plant and equipment
constructed primarily of steel materials and that the
t operated on a 440 volt electrical system. He believed
the lack of proper grounding posed a hazard of electri-
shock. In the event of a short circuit in the system,
In view of the wet plant conditions, someone contacting a
e circuit" resulting from a short in the system could be
ked or electrocuted. In addition, the record establishes
the plant wiring had been in place for some time without
er grounding or testing. Under the circumstances, I con-
e and find that the testing and grounding conditions pre-
ed a reasonable likelihood of an accident or injury of a

record establishes that the loader was operated in that cond. tion for at least 2-days prior to the inspection. Inspector Sanders believed that it would have been operated for a longer period of time had he not been at the mine for an inspection, and while he acknowledged that it may have been operated in a "controlled environment," he was concerned that it would have been operated until some unspecified time pending the arrival of a new one.

Although the respondent asserted that a new loader was on order, the fact is that its maintenance shop was in Dallas and the mechanic had to travel to the plant for maintenance. Respondent asserted that the loader was not repaired before the inspection because the mechanic did not show up as scheduled. Since the respondent had a new loader on order, I believe one can reasonably assume that it would not expend money for a brake job given the fact that a new one was on order. I believe that there is a strong inference in this case that the respondent intended to use the loader with inadequate foot brakes until the new one was placed in operation. Since the loader with inadequate brakes was the only one available at the plant, I further believe that the inspector's concern that it would have been used if necessary in areas outside the "controlled environment" was real and reasonable. Under the circumstances, I conclude and find that the inadequate brake condition constituted an accident and injury hazard, and had an accident occurred, I believe it is reasonably likely that disabling injuries would have resulted Accordingly, the inspector's "S&S" finding with respect to Citation No. 2241058, IS AFFIRMED.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate and reasonable for the violations which have been affirmed.

n No.	Date	30 C.F.R. Section	Assessment
)1	2/14/85	56.12025	$213
)2	2/14/85	56.12028	$213

Jo. CENT 86-14-M

ı No.	Date	30 C.F.R. Section	Assessment
;8	8/15/85	56.9003	$1,250
.4	9/9/85	50.30(a)	$ 20

ORDER

respondent IS ORDERED to pay the civil penalties by me in these proceedings within thirty (30) days ate of these decisions. Payment is to be made to d upon the receipt of same, these proceedings are d.

George A. Koutras
Administrative Law Judge

tion:

id Tilson, Esq., Office of the Solicitor, U.S. ıt of Labor, 525 South Griffin Street, Suite 501, TX 75202 (Certified Mail)

\gnew, Esq., Carter, Jones, Magee, Rudberg & Mayes, Main Place, Dallas, TX 75250 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-138-M
	:	A.C. No. 41-00010-05502
	:	
	:	Capitol Cement Plant
CAPITOL AGGREGATES, INC., Respondent	:	

DECISION

Appearances: James L. Manzanares, Esq., Office of the Solicitor, U.S. Department of Labor, Dalla Texas, for Petitioner;
Richard L. Reed, Esq., Johnston, Ralph, Re Cone, San Antonio, Texas, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals fil by the petitioner against the respondent pursuant to sect 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety stan dards found in Part 56, Title 30, Code of Federal Regulat

The respondent filed a timely answer and contest, su poenas were issued, and pursuant to notice the case was h in San Antonio, Texas, on February 25, 1986.

Issue

The issue in this case is whether the respondent vio lated the cited mandatory safety standards, and if so, th appropriate civil penalties which should be assessed for violations in question. Additional issues raised by the ties are i entified an is uss d in the course of t i

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties agreed that the respondent's Capitol Cement Plant is a "mine" as that term is defined by the Act, and that the respondent and the plant in question are subject to MSHA's enforcement jurisdiction as well as the jurisdiction of the Mine Safety and Health Review commission.

The parties agreed that at all times relevant to this proceeding the respondent's plant worked 277,985 annual man-hours, and that the corporate entity controlling the operation of the plant worked 607,510 annual man-hours.

The parties agreed that the assessment of the proposed civil penalties for the citations in question will not adversely affect the respondent's ability to continue in business.

The parties agreed that the respondent abated the citations in question in good faith.

Exhibit P-1 is an MSHA computer print-out reflecting the respondent's prior history of violations. The information provided reflects that for the period February 21, 1983 to February 20, 1985, the respondent had three assessed violations for which it paid civil penalties totaling $60. For the period prior to February 21, 1983, respondent had seven assessed violations, and paid a civil penalty assessment of $98 for one of the violations.

Discussion

The alleged violations in this case were all issued after an MSHA fatality investigation at the respondent's plant. The facts show that an intoxicated laboratory technician employed by the respondent intentionally misused and inhaled nitrous oxide gas which resulted in his death. The alleged violations which were issued are as follows:

1984, at about 0200 hours, when an employee was found on the floor, unconscious, in the main room of the laboratory. The employee was pronounced dead at the hospital approximately 1 hour later. The autopsy report showed 0.171 alcohol in the blood and nitrous oxide in the bile due to intentional inhalation by the employee.

Section 104(a) "S&S" Citation No. 2241817, March 13, 1985, cites an alleged violation of 30 C.F.R. § 56.18-2, and the condition or practice is stated as follows:

A fatal accident was experienced on November 24, 1984. The operator had failed to cause safety and health hazard inspections of all work areas to be conducted each shift. No persons were designated to conduct these inspections and record these findings. Conductance of such inspections would have acted as a deterrent to the apparent abuse of the industrial gas, Nitrous Oxide, and the presence of workers under the influence of alcohol at the mine site.

Section 104(a) "S&S" Citation No. 2241818, March 13, 1985, cites an alleged violation of 30 C.F.R. § 56.20-11, and the condition or practice is stated as follows:

A fatal accident occurred on November 24, 1984. There had been no signs posted at the exterior laboratory industrial gas supply and service area, or within the laboratory to warn employees of the nature of the hazards involved and the protective action required. Highly combustable, explosive and asphyxiating gases were being routinely used in these areas.

cotics shall not be permitted on the job."

The respondent denied that it permitted any person under the influence of alcohol or narcotics on the job, or that intoxicating beverages and narcotics were permitted by the respondent, or used in or around its mine.

The inspector who issued the citation on February 21, 1985, subsequently modified it on April 23, 1985, and his modification states as follows:

> The negligence * * * is reduced from low to none. The company had done all that would be reasonably expected of them to be required and not allow alcohol on the property or drug useage by publishing safety rules which were printed and signed as to being read by the victim.

Petitioner's counsel moved to withdraw Citation No. 2231659, on the ground that the evidence will not support a violation of the cited mandatory safety section 56.20-1. Counsel stated that the petitioner cannot establish that the respondent permitted the use of intoxicating beverages or narcotics on the job.

Petitioner's motion to withdraw its proposal for assessment of a civil penalty for Citation No. 2231659, February 21, 1985, 30 C.F.R. § 56.20-1 IS GRANTED, and the citation IS VACATED.

Citation No. 2241817 - Fact of Violation

30 C.F.R. § 56.18-2, provides as follows:

> (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

respondent agreeing to pay a civil penalty assessment in the amount of $168. The initial proposed "special assessment" was in the amount of $500.

In support of the reduction of the proposed civil penalty assessment, petitioner's counsel took into consideration the fact that the respondent could not have reasonably foreseen that the employee would have intentionally and voluntarily inhaled the nitrous oxide kept in the plant laboratory for the respondent's legitimate business needs. Although counsel believed that he could support a finding of high negligence because a daily examination may have acted as a deterrent, he also believed that the gravity of the violation is less than originally assessed because such an examination would not likely have prevented the employee from intentionally inhaling the nitrous oxide.

Petitioner's counsel confirmed that the intentional act of the employee in question endangered only himself and no other miners, and that the respondent has taken appropriate action to insure or preclude future incidents of this kind.

After careful consideration of the arguments presented in support of the proposed settlement of the violation, I conclude and find that it is reasonable and in the public interest, and IT IS APPROVED. The citation IS AFFIRMED.

The respondent's counsel stated that in agreeing to settle the violations in question and to pay the agreed upon civil penalty assessments the respondent does not agree to liability for the alleged violations, but has taken into consideration the cost of further litigation.

Citation No. 2241818 - Fact of Violation

30 C.F.R. § 56.20-11, provides as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and protective action required."

nd in section 110(i) of the Act, I conclude it is in the blic interest, and IT IS APPROVED. The violation IS FIRMED.

ORDER

In view of the foregoing, Citation No. 2231659, IS CATED, and the petitioner's civil penalty proposal IS SMISSED. The respondent IS ORDERED to pay a civil penalty the amount of $168 for Citation No. 2241817, and a civil alty in the amount of $168 for Citation No. 2241818. yment is to be made to MSHA within thirty (30) days of the te of this decision and order, and upon receipt of payment, is case is dismissed.

George A. Koutras
Administrative Law Judge

stribution:

mes J. Manzanares, Esq., Office of the Solicitor, U.S. partment of Labor, 525 Griffin Street, Suite 501, Dallas, 75202 (Certified Mail)

hard L. Reed, Esq., Johnston, Ralph, Reed & Cone, 00 Tower Life Building, San Antonio, TX 78205 (Certified il)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 84-19-M A.C. No. 05-01054-05501
v.	:	San Aroya Mine or San Aroya Pit
WALSENBURG SAND AND GRAVEL COMPANY, INC., Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, for the Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act arose from inspections of the respondent's sand pit near Walsen Colorado on March 3 and March 7, 1983. On those dates, federal mine inspectors issued a total of 13 citations for violations o various safety standards promulgated by the Secretary of Labor pursuant to the Act. The respondent, Walsenburg Sand and Grave Company, Inc. (Walsenburg), contested the Secretary's petition imposition of civil penalties. The case was heard at Pueblo, C with both parties presenting evidence. Neither party wished to briefs or other post-hearing submissions.

GENERAL BACKGROUND

The undisputed evidence shows that Walsenburg's San Aroya Pit, where the inspections occurred, is located in an old river bed. Sand is extracted from the surface with front-end loaders It is washed, screened, and stored in large piles at the site until needed. It is then loaded and trucked away. The company actually extracts and processes sand during warm-weather months only; frozen ground surfaces prevent removal during the remainc of the year. Sand is trucked away from storage piles throughou the year, however, as construction demands dictate.

Walsenburg concedes that its activities affect commerce wi
he meaning of the Act.

REVIEW AND DISCUSSION OF THE EVIDENCE RELATING TO ALLEGED VIOLATIONS

itation No. 2098376

On March 3, 1983, Jake DeHerrera, a federal mine inspector
isited Walsenburg's San Aroya pit. On that occasion he observ
pproximately 150 feet of an electrical power line lying on the
round at the site. Closer inspection revealed that some of th
oles intended to support the line had collapsed, and that the
20-volt line was energized. The last standing supporting pole
or the line was immediately adjacent to a 500-gallon diesel fu
ank where respondent's front-end loader was refueled. The in-
pector issued a citation to Walsenburg charging a violation of
ine safety standard published at 30 C.F.R. § 56.12-30. That
tandard provides:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Walsenburg does not deny that the inspector correctly desc
he condition. It did, however, deny that its management knew
ondition, and also asserted that the line was the responsibili
local power company. Louis P. Vezzani, who described himself
co-owner" of the sand and gravel company, further testified th
ine had supplied power to a trailer home once situated on the
ite at the instance of the lessor of the site, and that it the
erved no purpose related to his company's operation.

I must conclude that the facts nonetheless establish a vio
ation of the cited standard. The undisputed evidence shows th
he last standing power pole to which the 220-volt line in ques
as attached also furnished 110 volts of power to the pump for
iesel tank. (See photograph, petitioner's exhibit 1.) Thus,
ower distribution system in question was not totally divorced
hat supplying the Walsenburg operation. Even were this not so
owever, the downed 220-volt line lay on the Walsenburg site an
resented a hazard to its employees. The evidence shows that t
wo Walsenburg miners present at the time of the inspection, on

Citation No. 2009814

On his March 3, 1983, inspection, Mr. DeHerrera was a
companied by Inspector Elmer E. Nichols. Inspector Nichol
fied that the 110-volt electrical outlet on the power pole
the diesel fuel tank and pump was not grounded. He theref
issued a citation charging a violation of the safety stand
published at 30 C.F.R. § 56.12-25. That standard, as pert
here, provides:

> All metal enclosing or encasing elec-
> trical circuits shall be grounded or
> provided with equivalent protection.

According to Inspector Nichols, he plugged an outlet teste
the receptacle on the pole. It showed that the energized
was not grounded. Terrance D. Dinkle, an electrical engir
the staff of the MSHA Denver Technical Support Center, tes
at length concerning hazards involved in this and other ci
alleging electrical violations. Mr. Dinkle asserted that
circuit breakers on circuits which lack proper grounding w
prevent electrical shock to persons coming into contact wi
circuit, should there be an electrical fault.

Walsenburg presented no evidence on this citation. T
dence of record establishes the violation alleged.

Citation No. 2098378

Inspector DeHerrera visited Walsenburg's San Aroya Pi
on March 7, 1983. On that occasion he observed that the e
service to the fuel pump at the 500-gallon diesel tank was
"explosion type." He therefore charged Walsenburg with a
of the safety standard published at 30 C.F.R. § 56.12-2.
standard provides:

> Electric equipment and circuits shall
> be provided with switches or other
> controls. Such switches or controls
> shall be of approved design and con-
> struction and shall be properly in-
> stalled.

ce.

tion No. 2098379

During the inspection on March 3, 1983, Inspector DeHerrera
rved that the opening where electrical wires entered the breake
on the service to the diesel fuel pump lacked bushings. He
efore issued a citation charging violation of the standard
ished at 30 C.F.R. § 56.12-8. That standard provides:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Dellerrera testified that the box was fastened to the power
near the pump at about 5 to 5-1/2 feet above ground level.
standard requires that the openings be bushed, he asserted,
two reasons. First, without bushings, the metal edges of the
ings may wear away the insulation on the wires, thus creating
ort or fault where bare wire contacts the box. Second, the
s must be bushed to provide "strain relief." Without the
ings, he indicated, any pulling or other exterior strain on
wires could loosen them from their terminal connectors within
box, thus creating a fault. Mr. Dinkle, the Secretary's
trical expert, supported the inspector's testimony. The evi-
e shows that should an employee touch the box, once a fault
occurred, he could receive an electrical shock. Dinkle also
ified that where a fault occurs in a circuit, a circuit breake
use does not provide any assurance that a person coming in
act with the circuit will not receive a significant shock.
s particular observation was directed to all citations in-
ing electrical fault hazards.) (Tr. 258).

Walsenburg presented no testimony concerning the citation.
Secretary's evidence establishes a clear violation of the
dard.

tank rested on a foundation of wooden timbers. DeHerrera believe this condition violated the safety standard published at 30 C.F. 56.4-4. That standard, as pertinent here, provides:

> Flammable liquids shall be stored in accordance with standards of the National Fire Protection Association or other recognized agencies approved by the Mine Safety and Health Administration.

According to DeHerrera, The National Fire Protection Codes (published by the National Fire Protection Association) provide at chapter 30, section 2-5.1, that timbers may not be used as a foundation for a flammable liquids tank. The pertinent portion of the section declares:

> Tanks shall rest on the ground or on foundations made of concrete, masonry, piling or steel.

DeHerrera testified that the timbers constituting the foundation appeared to be soaked with diesel fuel, thus posing a fire hazar

I have a major difficulty with the Secretary's case. I am certain that the standard in question absolutely forbids the use timbers in foundations. The Secretary's position appears to be predicated upon that belief. I note that the N.F.P.A. publicati allows tank foundations made of "piling." "Webster's Third New International Dictionary (1976)" defines a pile as "a long slend member usu. of timber, steel or reinforced concrete driven into ground to carry a load, to resist a lateral force, or to resist water or earth pressure." (Emphasis added.) It also offers the first definition of "piling" as follows: "pile driving: the formation of (as of a foundation) with piles."

I am thus unable to conclude, as the Secretary would have m do, that the N.F.P.A. altogether proscribes the use of timbers i foundations. On the contrary, timber pilings are apparently wel Similarly, for tank supports above a foundation, timbers may als used in some instances. Chapter 30, section 2-5.2 of the Code, which pertains to such supports for tanks storing flammable liqu provides in part:

djacent to the tank is on a shadow-obscured platform of some so
at the foundation of the tank itself is not visible. The tank
ppears to rest upon the ground.

Absent evidence that the timbers referred to were not pilin
riven into the earth, I cannot hold that the Secretary proved a
iolation here. The citation will be vacated.

Citation No. 2098581

On March 7, 1983, Inspector DeHerrera noted that the drive
lywheel on Walsenburg's sand classifier machine lacked an adequ
uard. He cited this condition as a violation of the safety
tandard published at 30 C.F.R. § 56.14-1. That standard provid

> Gears; sprockets; chains; drive, head, and takeup pulleys, flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

According to DeHerrera, the 36-inch flywheel was located ab
to 5 feet above the ground. He acknowledged that the rim of t
heel was properly guarded. The face of the wheel and the shaft
owever, were not protected. DeHerrera maintained that as the
lassifier was in operation with two employees in the vicinity,
nguarded portion of the flywheel presented a hazard to those em
loyees. Specifically, he believed that an employee checking th
peration of the machine, or simply walking by, could stumble in
he exposed, rotating parts and suffer injury.

For Walsenburg, Mr. Louis P. Vezzani testified that the cen
the large flywheel was 7 feet above the ground, and that the
perator's station was a considerable distance away. When the
perator was not at his panel, Vezzani said, he would shut down
he machine and thus could not be endangered. He did acknowledg
owever, that there was some possibility that employees could co
contact with the wheel (Tr. 110).

The credible evidence establishes that although the hazard
ot great, Walsenburg violated the guarding standard. Whereas t

served that the 220-volt electrical services to the feed convey
and classifier 1/ drive motor were not protected by bushings wh
the wire or cable left the junction box. He also found that th
box lacked a cover and was not weatherproof. He therefore issu
a citation charging a violation of the safety standard publishe
at 30 C.F.R. § 56.12-8. The text of that standard has been pre
ously set forth in this decision in the discussion of citation
no. 2098379. It requires power cables and wires to be "insulat
adequately where they pass in and out of electrical compartment
It similarly provides that cables shall enter compartments or o
enclosures only through "proper fittings." Finally, it require
that "insulated wires other than cables" must be "substantially
bushed with insulated bushings" where they pass through holes i
metal frames.

For the reasons which follow, I must hold that no violatio
was proven. The cited standard makes a clear distinction betwe
insulated wires and cables. It requires bushings for wires but
not for cables. For cables it merely requires "proper fittings

The evidence describing the lines in question was confusin
The inspector himself repeatedly referred to them as "cables."
Mr. Vezzani also spoke of them as cables and insisted they were
encased in conduit. Upon the record made, I must conclude that
the Secretary did not establish that the lines were "wires" rat
than "cables." Thus, the bushings violation was not proved.

That the junction box lacked a cover was undisputed. The
only part of the standard which could conceivably apply to that
defect, however, is that part which declares that cables "shall
enter ... electrical compartments only through proper fittings.
Rather plainly, the provision applies only to that part of an
enclosure through which the cable enters. I do not read it to
impose requirements concerning other construction features of t
box itself. Perhaps this provision would have had relevance ha
it been shown that the cable entered the box through the space
left open by the missing cover, rather than through the bottom,
top, or side. There was no such evidence, however.

I have the same problem with whether the box was "weather-
proof." The Secretary's electrical engineer, Mr. Dinkle, made
out a convincing case of the need for weatherproofing in such a
installation (Tr. 242-244). He indicated that the box was not

246). Perhaps the term "proper fittings" referred to in the ins
standard is a term of art among electrical experts, one broad en
to encompass weatherproofing. I doubt it, however. If it is, t
record lacks expert testimony sufficient to demonstrate such a
meaning. As the record stands, no violation is proved because t
cited standard appears inapposite.

Citation No. 2098583

This citation also arose out of Inspector DeHerrera's visit
to the pit on March 7, 1983. His inspection of the drive unit f
the feeder conveyor revealed several pinch-points which were not
guarded. Specifically, the drive chain and sprockets lacked any
guarding. Also, the feeder mechanism itself - two large moving
on an eccentric wheel - was unguarded. Finally, the tail pulley
the feed conveyor was unguarded. DeHerrera cited these conditio
as violations of 30 C.F.R. § 56.14-1. That standard, requiring
guarding of moving parts of machinery, is set out in the discuss
of citation No. 2098581.

Mr. Vezzani, for Walsenburg, pointed out that guarding in t
form of barrier-railings was available for the cited areas. The
railings, however, were unbolted and lying on the ground (Tr. 14
141). The inspector agreed that the railings (which were later
installed to abate the alleged violations) would have been adequ
guards (Tr. 139).

The evidence shows that Walsenburg violated the standard as
alleged. The equipment was in operation and two employees of th
operator were in the general vicinity. Some of the moving parts
were partially guarded by virtue of their locations with respect
to metal frames or other parts of the equipment. Such partial
guarding by location, however, is not the equivalent of the full
guarding required by the standard. There was a small but never-
theless realistic possibility that employees could have been in

Citation No. 2098584

On March 7, 1983, Inspector DeHerrera cited a grounding def
in the 110-volt service furnishing electric power to the diesel
pump at the fueling station described earlier in this decision.
The citation alleged a violation of the grounding standard set o
at 30 C.F.R. § 56.12-25. The standard is set out in full in the

The Secretary's evidence clearly establishes the violation arged. The circuit had no ground as required by the standard, d the presence of a circuit breaker does not provide electrica lt protection equivalent to a ground.

tation No. 2009968

On March 7, 1983, MSHA electrical specialist Larry J. Day und that the electric cable providing power to five 220-volt ee-phase motors included an energized wire insulated with a en covering. Green wires, he testified, are universally used noncurrent-carrying ground wires. Anyone familiar with elec l practice, according to Mr. Day, would, during maintenance, sume the green line was nonconductive. Since it was energized ever, a repair person could receive a severe shock. This wou st likely occur should the green wire be attached to the equip nt frame, as is the common practice. Mr. Dinkle, the Secretar ctrical engineering expert, supported Mr. Day's analysis.

The citation charged a violation of the standard published 30 C.F.R. § 56.12-30. That is the standard, discussed in con ction with citation no. 2098376, which requires correction of tentially dangerous conditions" in wiring or equipment.

Gary M. Vezzani, who described himself as an electronics gineer with three associate degrees in electronics, testified r Walsenburg. He agreed that it was improper to use the green re. He suggested, however, that a careful repairman would not ly on the color of the wire, but would routinely test all wire determine which were energized. He also appeared to suggest at if the energized green wire was mistakenly attached to the uipment frame, the repairman would be saved from injury by the rcuit breaker. He disagreed with certain statements by the ernment's Mr. Nichols concerning grounding. Grounding, howev s not mentioned in the citation and is not an issue here.

I must conclude that the evidence establishes the violation arged. Walsenburg admits that the green wire was improperly ed. I do not find credible the notion that repairmen would no ly on the color-coding of electrical wires. For the reasons cussed earlier in this decision, neither do I accept the prop ion that circuit breakers can protect workers from electrical

According to Day, a three-wire Romex cable attached to the s
f a power pole was exposed to damage from vehicles. He testifie
nat he saw cuts on the cable covering, and that protection from
act should have been provided by running the exposed lower 8 fee
f the cable through a rigid pipe or flex pipe. If the wires wer
aid bare by an impact, he maintained, a fault could result which
ould energize the ground wire or cause a fire. This could endan
he two employees in the area.

Walsenburg presented no testimony on this citation. The evi
ence establishes that the respondent violated the standard in th
anner alleged.

itation No. 2009972

Day also cited respondent with a violation of the guarding
andard, 30 C.F.R. § 56.14-1, for an unguarded drive pulley powe
he belt drive operating the shaker screen. He was unable to rec
he height of the pulley from the ground, but could recall that i
as accessible to persons in the area. The pulley had no guardin
e testified, and could therefore catch the clothing, hands or fi
any worker who might happen by.

Walsenburg furnished brief testimony on this citation by Lou
ezzani. He asserted that the drive pulley was ordinarily 8 feet
bove the ground, and thus above the reach of workers. He admitt
owever, that on March 7, 1983, the day of the inspection and cit
xcess sand accumulations near the shaker screen had raised the g
evel sufficiently to put the pulley within reach of persons star
ear the equipment.

The evidence shows that the standard was violated as alleged

itation No. 2009973

Day, on the March 3, 1983, inspection, also cited what he de
cribed as a guarding violation on the tail pulley of the shaker
he belt was moving and carrying material at the time he observed
maintained that the lack of a guard on the pulley constituted
iolation of 30 C.F.R. 56.14-1, the guarding standard discussed s
times previously in this decision. He recalled the height of
ail pulley to be 6 to 8 inches above the ground. The two employ
ho were running the plant, he testified, were exposed to the ha

tween the roller and belt and thus suffer injury. Vezzani did knowledge that this could occur (Tr. 235-236).

Plainly, the violation here was minor, but there was never- eless a foreseeable possibility of some injury. The citation st be affirmed.

GNIFICANT AND SUBSTANTIAL ISSUE

The Secretary contends that one of the 13 violations allege this case should be considered "significant and substantial," that term is used in the Act. The charge is made in connecti th citation no. 2098376, which involved the downed 220-volt ectric line.

The Commission in Cement Division, National Gypsum Company, MSHRC 822 (1981) set out the test for determining whether a lation, in the words of the statute, "... could significantly d substantially contribute to the cause and effect ... of a mi fety or health hazard." Such a violation, the Commission held one where there exists "... a reasonable likelihood that the zard contributed to will result in an injury or illness of a asonably serious nature."

For the reasons which follow, I conclude that the violation tablished does not rise to the "significant and substantial" vel. The evidence shows that the energized 220-volt line, som whose supporting poles had collapsed during the winter, did e on the ground within the pit area. The evidence also shows, wever, that its path did not take it close to any fixed machin cations or other likely work places. It was attached to a pol xt to the diesel fueling station, but that pole was still stan us, the only likely exposure would occur if a loader operator ould drive his vehicle over the downed portion of the line.

Mr. Dinkle, the Secretary's principal electrical expert, inted out that rubber tires, contrary to common belief, have me conductive properties because of their high carbon content. also explained, however, that the shock received from a drive nning over the downed line would likely amount to no more than "tingle" (Tr. 256). That slight shock might be enough to caus river to lose control of the vehicle, which could lead to fur ysical harm, he testified.

other evidence, however, it does not tend to demonstrate that an
likely encounter with the wire would "... result in an injury of
reasonably serious nature." On the contrary, it tends to show t
injury, if any, would likely be transient and mild. It must be
remembered that the sand processing plant was not yet in seasona
operation when the inspector issued his citation (March 3, 1983)
Only two employees were on the grounds, and they were merely loa
and trucking away sand from distant storage piles. It is not
probable that they would have had occasion to be near the line a
all. Had one of the workers approached it, it is overwhelmingly
likely that he would merely have driven across it in a rubber-ti
vehicle and have received, at most, a mild shock. The chance th
a momentary loss of control of the vehicle from the shock would
have resulted in an injury accident was remote. In the area of
pit where the line lay, there were really no objects to run into

It is surely true that if a person were to absorb the full
120-volts carried by the line he would, as Mr. Dinkle said, be
electrocuted. No witness, however, explained how this might hap
The evidence shows that most of the insulation was intact. Pre-
sumably, a severe or lethal shock could occur should a person de
cide for some reason to handle the line at a spot where the insu
was defective. I must note, however, that such an incident woul
have been most unlikely in view of the limited loading activity
progress at the time in question. One could, after all, conceiv
of similar unlikely possibilities for each of the other electric
violations in this case which the Secretary chose not to cite as
"significant and substantial."

DETERMINATION OF APPROPRIATE PENALTIES

Except for the single citation alleged to have been "signif
cant and substantial," (citation 2098376), the Secretary propose
civil penalty of $20.00 for all violations. For that single ex-
ception, the proposal is for $68.00.

Section 110(i) of the Act requires the Commission, in penal
assessments, to consider the operator's size, its negligence, it
good faith in seeking rapid compliance, its history of prior vio
lations, the effect of a monetary penalty on its ability to rema
in business, and the gravity of the violation itself.

The evidence shows that the Walsenburg operation was quite

olations was similar and was not deserving of a weighty penal
each instance only the same two employees were exposed to the
zard, and their exposure was in terms of access to the dangero
nditions. Actual contact with the unguarded parts of equipmen
with the defective electrical wiring or fixtures was not like
r these reasons I conclude that a modest penalty of $20.00 is
propriate for each of those violations for which that sum was
oposed.

That leaves for determination citation no. 2098376, for whi
e Secretary proposed the $68.00 penalty. As previously indica
am not convinced that the 220-volt distribution line which had
llen to the ground constituted a "significant and substantial"
olation under the Act. I must now go further and declare that
at violation neither involved more operator negligence nor mor
avity than the other violations proved by the Secretary. Whil
e line did cross the grounds of the worksite, it was unlikely
y worker would encounter it unless he should drive across it i
bber-tired vehicle. The probability that the vehicle operator
uld receive more than a mild electrical shock was quite remote
nsequently, the appropriate penalty for that violation is also
0.00.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with
e factual determinations contained in the narrative portion of
is decision, the following conclusions of law are made:

(1) The Commission has the jurisdiction to decide this mat

(2) The respondent, Walsenburg, violated the mandatory saf
andard published at 30 C.F.R. § 56.12-30 as alleged in citatio
. 2098376.

(3) The violation was not "significant and substantial" wi
e meaning of section 104(d) of the Act.

(4) Walsenburg violated the mandatory safety standard publ
30 C.F.R. § 56.12-25 as alleged in citation no. 2009814.

(5) Walsenburg did not violate the mandatory safety standa
blished at 30 C.F.R. § 56.12-2 as alleged in citation no. 2098

ndard published at 30 C.F.R. § 56.4-4 as alleged in citation 2098380.

(8) Walsenburg violated the mandatory safety standard olished at 30 C.F.R. § 56.14-1 as alleged in citation no. 98581.

(9) Walsenburg did not violate the mandatory safety ndard published at 30 C.F.R. § 56.12-8 as alleged in citation 2098582.

(10) Walsenburg violated the mandatory safety standard olished at 30 C.F.R. § 56.14-1 as alleged in citation no. 98583.

(11) Walsenburg violated the mandatory safety standard olished at 30 C.F.R. § 56.12-25 as alleged in citation no. 98584.

(12) Walsenburg violated the mandatory safety standard olished at 30 C.F.R. § 56.12-30 as alleged in citation no. 99968.

(13) Walsenburg violated the mandatory safety standard olished at 30 C.F.R. § 56.12-4 as alleged in citation no. 99970.

(14) Walsenburg violated the mandatory safety standard olished at 30 C.F.R. § 56.14-1 as alleged in citation no. 99972.

(15) Walsenburg violated the mandatory safety standard lished at 30 C.F.R. § 56.14-1 as alleged in citation no. 99973.

(16) The reasonable and appropriate civil penalty for ch of the violations affirmed in this case is $20.00.

ORDER

Accordingly, citations numbered 2098378, 2098380 and 98582 are ORDERED vacated; all other citations are ORDERED firmed; and Walsenburg is ORDERED to pay the Secretary of a civil penalty totaling $200.00 within 30 days o th

80294 (Certified Mail)

Ernest U. Sandoval, Esq., P.O. Box 541, Walsenburg, Colorado
(Certified Mail)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 85-79-M A.C. No. 05-03920-05501
v.	:	Vezzani Pit Mine
WALSENBURG SAND & GRAVEL COMPANY, INC., Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, for the Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), arose from an inspection of respondent's gravel pit on December 5, 1984. On that day a federal mine inspector issued a single citation for the violation of a mandatory safety standard promulgated by the Secretary of Labor pursuant to the Act. The respondent, Walsenburg Sand & Gravel Company, Inc. (Walsenburg), contested the Secretary's petition for imposition of a $20.00 civil penalty. The case was heard at Pueblo, Colorado, with both parties presenting evidence. Both parties waived the filing of briefs or other post-hearing submissions.

REVIEW AND DISCUSSION OF THE EVIDENCE

On December 5, 1984, two federal mine inspectors, Ralph E. Billips and Carl Baron, visited Walsenburg's gravel pit in Huerfano County, Colorado. In the course of inspecting the company's heavy equipment, they observed a fluid leak from the rear differential of a Hough 70 Series front-end loader. The leak was on the right side of the differential, and the fluid was present on the exterior of the right-rear wheel.

The four-wheeled loader was dumping rock into the rock crusher at the time of the inspection. The two inspectors knew that the loader had drum brakes in the rear, and feared that

indicated that the operator said "... he was having problems with the right-rear brake" (Tr. 36).

Based upon this information, Inspector Billips issued a citation charging Walsenburg with violation of the mandatory safety standard published at 30 C.F.R. § 56.9-2. That standar provides:

> Equipment defects affecting safety shall be corrected before the equipment is used.

Mr. Louis Vezzani testified for Walsenburg. He indicated that he is the "owner and operator" of the company. Vezzani acknowledged that the rear differential was leaking some fluid He testified, however, that he and a mechanic pulled the right rear wheel and examined the brakes after Billips issued the citation. The bands and drums, he claimed, were wholly free of fluid and were in proper working order. He said that the seal itself was not leaking; but he found that the plate upon which the seal was seated had a small "ding" which accounted for the escape of differential oil. He found nothing which wo impair the effectiveness of the brake. He and his helper repaired the "ding," and replaced the seal, but did nothing more (Tr. 22-24).

Moreover, according to Mr. Vezzani, no employee had reported to him any difficulty with the loader's brakes.

It is clear from the inspectors' testimony that they did not contend that the mere presence of differential fluid on th exterior of the rear wheel was a defect "affecting safety" und the cited standard. Otherwise they would not have gone on to explain the hazards of brake failure associated with the fluid reaching the interior of the wheel and specifically the bands or drums. Put another way, the presence of the fluid raised i their minds a possibility that effective braking was jeopardiz They found confirmation for that suspicion in the admission of the operator of the loader that the right-rear brake was defective.

matter within the scope of his employment. Such statements are
t hearsay under the Rule. While the employee's statements were
missible, the question confronting us here is one of testimonia
ight.

Mr. Vezzani testified that he inspected and tested the brake
d found no defect. Mr. Vezzani was a forthright witness, and I
und his testimony convincing. I do not doubt that the loader
erator spoke as the inspector said he did. Unlike Vezzani, how
er, who was present and subject to cross-examination, neither
e accuracy of the operator's observations or his possible motiv
biases were open to courtroom scrutiny.

I therefore conclude that the Secretary has failed in his
oofs. The citation must be vacated.

CONCLUSIONS OF LAW

Upon the entire record herein, and in accordance with the
ctual findings contained in the narrative part of this decision
e following conclusions of law are made:

(1) This Commission has jurisdiction to hear and decide thi
tter.

(2) Walsenburg did not violate the standard published at
C.F.R. § 56.9-2 as alleged.

ORDER

Accordingly, the citation in this case is ORDERED vacated ar
is proceeding is dismissed.

John A. Carlson
Administrative Law Judge

istribution:

bert J. Lesnick, Esq., Office of the Solicitor, U.S. Department
bor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado

DENVER, COLORADO 80204 March 28, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. WEST 84-70-M
	:	A.C. No. 02-01918-05501
v.	:	Gravel Pit Mine
GENERAL ROCK & SAND, Respondent	:	

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, Californi for the Petitioner.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Administration, charges respondent with violating safety regul promulgated under the Federal Mine Safety and Health Act, 30 U § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took in Phoenix, Arizona on January 28, 1986.

Procedural Matters

At the commencement of the hearing the Secretary moved fo missal of the respondent's notice of contest on the grounds th operator had failed to appear at the hearing.

The judge denied the motion and directed that the Secreta proceed with his proof. Subsequently, the judge issued an ord show cause directed to respondent. The respondent failed to r to the order.

Summary of the Case

Colby Lumpkins, Jr., an MSHA inspector and a person exper in mining, inspected respondent on December 14, 1983.

The foregoing facts caused the inspector to issue Citati
for the violation of 30 C.F.R. § 56.9-7. The regulation prov
follows:

> Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Inspector Lumpkins further observed that the wires conne
the junction box lacked a bushing connection. A bushing serv
hold the cable steady as well as secure. It also prevents th
from being pulled out. The junction box itself was attached
drive motor on a shaker screen. Its position subjected it to

In the inspector's opinion this violative condition coul
the insulation to wear through. Electrical shocks could resu
this occurred (Tr. 8,9).

The foregoing facts caused the inspector to issue Citati
for the violation of 30 C.F.R. § 56.12-8. The cited regulati
as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Lumpkins further observed an unguarded tail pu
section. In his opinion both sides of the tail pulley should
been guarded. Employees could be caught in the unguarded pul
(Tr. 12).

The foregoing facts caused the inspector to issue Citati

head, tail and takeup pulleys; flywheels; couplings; shafts; saw-blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarded.

Discussion

The record establishes a violation of each of the contested tations. They should be affirmed.

Proposed Civil Penalties

The statutory criteria for assessing civil penalties is con-ined in 30 U.S.C. § 820(i) which provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The record establishes that the operator has no previous ad-rse history. In addition, the operator must be considered to b all inasmuch as it only employs two or three workers. The reco es not present any information concerning the operator's financ ndition. Therefore, in the absence of any facts to the contrar find that the payment of penalties will not cause respondent to scontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973) d Associated Drilling, Inc., 3 IBMA 164 (1974). The operator s negligent since the violative conditions were open, obvious a own to the operator from a prior inspection. The gravity of th lations was high since severe injuries could have resulted fro ese conditions. To the o erator's credit was its ra id abateme

d.

he Commission has jurisdiction to decide this case.

espondent violated 30 C.F.R. § 56.9-7, § 56.12-8 and
56.14-1.

he contested citations and the proposed civil penalties
hould be affirmed.

ORDER

on the foregoing facts and conclusions of law I enter the
rder:

itation 2088144 and the proposed penalty of $20 are affirmed.

itation 2088145 and the proposed penalty of $20 are affirmed.

itation 2446500 and the proposed penalty of $54 are affirmed.

espondent is ordered to pay the sum of $94 within 40 days
e of this decision.

John J. Morris
Administrative Law Judge

on:

inski, Esq., Office of the Solicitor, U.S. Department of
7 Federal Building, 300 N. Los Angeles Street, Los Angeles,
90012 (Certified Mail)

Jessop, Owner, General Rock & Sand, P.O. Box 237, Page,
Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 85-165 A.C. No. 42-01697-0354
v.	:	Bear Canyon No. 1 Mine
CO-OP MINING COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicito U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Carl E. Kingston, Esq., Co-op Mining Company, Salt Lake City, Utah, for the Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety an Health Administration, (MSHA), charges respondent with viola safety regulations promulgated under the Federal Mine Safety Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits co menced in Salt Lake City, Utah on February 11, 1986.

At the hearing the parties stated that they had reached settlement agreement. No person objected to the proposal.

The citations, the standards allegedly violated, the or assessments and the proposal dispositions are as follows:

Citation Number	Standard C.F.R., Title 30	Assessment	Settlemer
2501153	§ 77.205(a)	$1000	Vacate
2501155	§ 48.7(c)	2000	Vacate
2501157	§ 48.5(a)	400	Vacate
2073270	§ 77.208	5000	$5000

raining requirement involved a single miner. It is further
d that the miner in question received such training but that
improperly recorded.

support of his motion to vacate Citation numbered 2501153
etary states the citation is redundant and such alleged
ns are within the allegations contained in Citation numbered

ave reviewed the proposed settlement and I find it is in
d in the furtherance of the public interest.

ordingly, I enter the following:

ORDER

Citation 2501153 and all penalties therefor are vacated.

Citation 2501155 and all penalties therefor are vacated.

Citation 2501157 and all penalties therefor are vacated.

Citation 2072270 and the proposed penalty of $5,000 are
.

Citation 2072271 and the penalty, as amended, in the amount
0 are affirmed.

Citation 2072272 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge

tion:

Barkley, Esq., Office of the Solicitor, U.S. Department of
585 Federal Building, 1961 Stout Street, Denver, Colorado
Certified Mail)

Complainant	:	
	:	Docket No. WEST 84-68-DM
v.	:	MD 82-82
	:	
PRUS MINES CORPORATION, Respondent	:	Cyprus Northumberland Project

DECISION

ppearances: Mary Gray Holt, Esq., Jolles, Sokol & Bernstein, Portland, Oregon, for Complainant; John F. Murtha, Esq., Woodburn, Wedge, Blakey & Jeppson, Reno, Nevada, for Respondent.

efore: Judge Morris

Complainant Harold J. Atkins, (Atkins), brings this actior n his own behalf alleging he was discriminated against by his mployer, Cyprus Mines Corporation, (Cyprus), in violation of t ederal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et eq., (the Act).

Section 105(c) of the Act, provides in part, as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint unde or relating to this Act, including a complaint notifyir the operator or the operator's agent, or the representa tive of the miners ... of an alleged danger or safety c health violation ... or because such miner ... has instituted or caused to be instituted any proceeding unde or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others c any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits took lace in Reno, Nevada on June 19, 1985.

Summary of the Evidence
Complainant's Evidence

Harold J. Atkins, 43 years of age and inexperienced in mining, was hired by Cyprus on July 9, 1981. His initial dut included utility work and cleaning the leach pads. His activ ties also involved work in the ADR [1]/ unit where the utility helped mix cyanide and haul water. The water, dumped into a preholding tank, feeds the boiler (Tr. 34-37, 41).

After three months Atkins transferred to the pit as a gr operator where he remained about 2 1/2 to 3 months (Tr. 37).

About October 1, 1981, because of higher pay, Atkins transferred to the ADR plant as an operator (Tr. 38). He had revious experience and the foreman trained him to run the mi (Tr. 39). The work process in the ADR was described as follo material containing gold and precious metals enters a preg po from the leach pads. The material then goes into the ADS cir Solution is filtered through and captured in the carbon (Tr.

After a time the material is moved into a preheat holdin tank and later transferred to a strip tank. The solution is heated by a boiler and it then goes to electrowind where the is removed (Tr. 40). The procedures include stripping, recla ing and preheating. The stripping process was almost continu (Tr. 40, 42).

After two or three weeks in the ADR plant Atkins experie a "nuisance" from the ammonia released in the stripping proce He had headaches; in addition, his nose was dry and bothering Since he felt the condition was minor he did not see a doctor that time (Tr. 41, 42).

Atkins was elected to the mine safety committee and atte his first meeting in February 1982. The Committee discussed first aid, inadequate ventilation and communications in event emergencies. When Atkins applied for the foreman's position was told he could not remain as a member of the committee if received the promotion (Tr. 42-44, 48).

1/ ADR: an acro for sorpti n, deabsorption and refining

problems which he related to the ADR work (Tr. 44, 45, 235).

Atkins thought Legace's physical problems and symptoms mi
be relevant to a worker in the ADR because of the carbon, the
open tanks and the refining process (Tr. 46, 47). Atkins thou
he was also exposed to mercury. Legace said it should be chec
out. He further recommended that Atkins and anyone else in th
ADR contact a doctor. This was the reason Atkins sought medic
attention (Tr. 47).

Sometime in April, about the time of the discussions with
Legace, Atkins thought he had a physical problem. The buildup
the ammonia was progressing to a point where he knew he should
have his sinuses checked. His nose was dry all of the time an
he was having breathing problems. Additional symptoms include
headaches, dizziness and blurred vision. Neither food nor cof
tasted right (Tr. 49-51).

Most of the time during his stay in the ADR, Atkins' main
problem and concern was exposure to ammonia fumes (Tr. 120; Ex
R23, pg. 2). MSHA did not issue any citations for excessive
levels of ammonia (Tr. 121).

Atkins visited Dr. Horgan on April 24, 1982. A quantitat
test for mercury showed a level of 65. Industrial guidelines
indicate an acceptable level is under 150. A toxic level is
above 150. Atkins wasn't satisfied with the doctor's answers
93-196; Ex. R5).

On April 29, 1982, Atkins had a quantitative test from Dr
Andrews. The doctor stated that 65 was high and he indicated
tate level was 150 milligrams. Atkins knew Legace was ex-
eriencing problems with a level of 86 or 87 (Tr. 49-53).

Atkins was the day foreman when MSHA inspector Frank B.
eale came on the premises on May 4, 1982. A 3M tag was used
test for mercury. There were no fans and the inspector, accor
ing to Atkins, was "staggered" at some of the readings (Tr. 60
61, 221).

Atkins was not aware of the later MSHA visit on June 14.
But in the interim Cyprus had taken corrective measures: these
ncluded warning signs, fume surveys, mercury testing and
respirators (Tr. 223, 224, 318).

After the MSHA inspection the company took care of the problem to a large degree (Tr. 65).

On June 9, 1982, Atkins visited Dr. Andrews, a pulmonologist. Complaints to Andrews included chemicals, ammonia, cyanide fumes and exposures to mercury. Complete blood and tests failed to confirm mercury poisoning. The blood mercur level was identified as less than 1. The reference range is than 2.6; the level is potentially toxic if it is over 2.6 (202-204; Ex. R14).

On June 10, 1982, Dr. Givens, a company doctor, gave At a general physical examination. The symptoms exhibited by Atkins, which all occurred about June 10, included nausea, colitis and split vision. The doctor was more interested in writing than in listening so Atkins did not tell him all of symptoms (Tr. 54, 69, 70). Atkins showed Dr. Givens the quantitative test. He stated that things were "alright" (Tr 55). Dr. Givens also told Atkins that his health was genera excellent. Dr. givens did not comment on the symptoms (Tr.

On June 29, 1982, Atkins saw Dr. Badshah, his family physician, to whom he also showed the quantitative test. Dr Badshah diagnosed Atkins' condition as colon colitis. He al had a lower and upper G.I. performed as well as a rectal examination. The blood tests forwarded to Dr. Badshah by Dr Andrews were normal (Tr. 55-58, 65, 215).

Atkins was concerned about his health and he mentioned superintendent Leveaux that he would like to temporarily lea the ADR because of his health. Leveaux said management woul need a doctor's statement to that effect (Tr. 65-67, 238). Atkins believed that the severity of the colon problem was worsening, and the condition was playing on his nerves. Atk felt the ADR was unsafe for him because his medical problems started there and they were not clearing up. He was having vision, mostly in the right eye. This occurred four times i 30 day span just after he started going to Dr. Badshah (Tr. 69, 242). Badshah had suggested Atkins contact Dr. Schonder ophthalmologist. The specialist, in turn, suggested that At go to the University because the problem was complicated (Tr 213). Dr. Schonders, as well as Doctors Horgan, Andrews and Givens failed to confirm mercury poisoning. But Dr. Badshah

To whom it may concern: Jim Leveaux. This patient
having cramping, abdominal pains, nausea. On exam there
is marked spasticity of the colon. He is advised to
avoid exposure to chemicals which are likely to aggravat
this condition. (Tr. 71, 72, 215, 216; Ex. R23).

Leveaux looked at the doctor's note and stated it would be necessary to talk to Appelberg, the Cyprus personnel manager (Tr 73, 74). Appelberg told Atkins he would transfer him to utility but cut his pay. In the ensuing discussion Atkins claimed this was a medical situation and his miner's rights guaranteed that h keep his foreman's pay in the utility job. Appelberg agreed to the transfer (Tr. 73-79). Atkins went to utility thinking he would retain his foreman's pay (Tr. 126-127).

The next day Appelberg told him his pay was cut. He could either go back into ADR, leave the property, or be fired. Rathe than be fired Atkins returned to the ADR. Atkins also stated he returned to utility the next day (Tr. 73-79).

One day before he was terminated Atkins explained the ultimatum and medical situation to MSHA inspector Frank Seale at the MSHA office. The next day (July 15) Atkins was told to work in the ADR or be fired (Tr. 78-81).

Before July 15th, between the two MSHA inspections, Atkins had told management that it was unsafe to work in the ADR. On the day he was terminated he did not say it was unsafe because h was more concerned about getting a note from the doctor than in closing down the ADR (Tr. 243).

Atkins also told Appelberg that he needed to get out of the ADR. It was unsafe for him (Tr. 238).

Atkins confirmed the contents of the typewritten note given to him by Appelberg when he was terminated and as well as his handwritten reply requesting an additional examination by a company doctor before he would return to the ADR (Tr. 112, 117, 118, 119; Ex. C21, R24).

Atkins was fired on July 15 as he refused to work in the AD The evidence contains a two page medical report, dated July 16, 1982, from Dr. Nur Badshah. The report states, in part, as follows:

further evaluated by a neurologist, because metall
poisoning can cause nervous system changes affecti
especially the cerebellar system. This should be
thoroughly evaluated by a neurologist. I also rec
that the patient should be thoroughly evaluated by
gastroenterologist for his gastrointestinal sympto
Until he is further evaluated by a neurologist and
gastroenterologist, patient is advised to avoid co
with chemicals and he has been given a note to tha
effect on 7-9-82. (Exhibit C14).

Atkins believed he suffered mercury poisoning in 1982.
quantitative test was 65. He could not state whether the A
a safe place to work in July 1982. When he discussed termi
with Appelberg on July 15, 1982, he may not have claimed th
was unsafe to work in the ADR. But at the time of that
discussion he believed the levels were close to acceptable
could have been perfectly safe in the ADR (Tr. 109). Atkin
would go back in the ADR today (Tr. 109-110). Further, he
have gone back if there hadn't been a problem (Tr. 124).

Before Atkins moved from Round Mountain he would have
accepted a job in the ADR if it had been offered to him. H
would not have gone back to work in the ADR in August or
September 1982 because of a possible NIC medical evaluation
99-100).

Atkins last hourly wage at Cyprus was $10.35 or $11.47
the ADR foreman. If he had not been fired he would have ea
$36,000. After being laid off in two months, Atkins found
ployment with Ray Dickinson earning $5 an hour. He worked
two and one-half months (Tr. 80-85). He was also employed
Teague Motor Company in 1984 earning $800 per month. In
addition, he had a county job for three months earning $800
After the county job Atkins received unemployment compensat
He has not worked since that time except about eight months
he occasionally played in a band on weekends. This part-ti
work pays $80 a weekend (Tr. 80-85, 94, 97, 98; Ex. C21, C2
C28). Atkins "guesses" that he has earned $300 playing in
band since he was terminated by Cyprus (Tr. 94).

The 1040 U.S. income tax returns for 1981 and 1982 sho
spectively, wages of $12,924 and $15,639 (Tr. 89; Ex. C25,

93, 94).

After he sold the trailer Atkins moved back to Oregon thr and one-half months after he was terminated. There were two trips involved which cost him $800 to $900 for trailer rentals (Tr. 88, 109-110).

Atkins acknowledges that he received a written notice of having had eight absences in the previous twelve months (Tr. 1 Ex. R22).

Mrs. Atkins testified that her husband's health problems began in 1982. He complained and became irritable. Additiona symptoms were mostly abdominal cramping and nasal headaches. related his ill health to conditions in the mine because he ha been in good health before working there (Tr. 250-252).

Respondent's Evidence

William Hamby, James Appelberg, Frank Seale and Sharon Badger testified for Cyprus.

William Hamby, the plant superintendent and metallurgist, indicated that Cyprus was closing down its operation in Septem 1985. He did not expect to be employed at the end of 1985 (Tr 253, 254, 296, 297).

Hamby and Atkins were in daily contact when Atkins began working as an operator in the ADR in October 1981. Atkins had successfully bid on the operator's job. As an ADR operator Atkins' duties included monitoring the pump, reagent mixing, a reagent determinations for strength, advancing carbon and mixi it (Tr. 256-261).

In February 1982, Cyprus learned of mercury problems in t ADR. The mercury, which came as a surprise to Cyprus, was detected by monitoring with a 3M 3600 Model badge type dosimet (Tr. 265, 266).

In March 1982 Cyprus ordered and installed a 98,000 C.F.M fan in the ADR (Tr. 296).

When Atkins became safety representative he voiced his concerns about t e lant en iro nt, the me ury and the qual

Hamby wasn't sure of the circumstances but Atkins told h
that he believed it was unsafe or hazardous to work in the AD
(Tr. 262-263).

In April 1982 Atkins was promoted to working foreman. T
osition opened because Cyprus went to full production. Hamb
eveaux and three other working foremen thought he was best
qualified for the position (Tr. 263). Because of the direct
etween management and foreman it was suggested to Atkins tha
e might want to relinquish his duties as safety representati
(Tr. 264).

Hamby denies that he ever threatened Atkins' job. Once
old him he was shooting his mouth off. In a handwritten not
dated April 23, 1982, he recorded that he told Atkins to keep
his opinions to himself about possible contamination by mercu
Further, some of the people were complaining that he didn't k
what he was talking about and it was upsetting them. Atkins
plied that he would "cool it" (Tr. 282, 283; Ex. R4).

On April 27 Hamby, in a letter to plant personnel, sough
bring all employees together with the plant hygienist and com
doctor to discuss mercury (Tr. 269; Ex. R7).

The company considered mercury to be a problem because o
the hazards associated with it. Before May 4 the company had
taken steps to discover the source of the mercury levels by u
a Bacharach MB-2 sniffer. On May 4, 1982, the new equipment
not operating properly. It had been inoperative for a week (
267-269).

On May 4 MSHA inspector Frank B. Seale inspected the ADR
On that day he issued five citations. They allege Cyprus fai
to post warning signs concerning health hazards in the ADR;
atmospheric concentrations of mercury vapor exceeded the ex-
cursion limit for an eight hour TWA coupled with a failure to
respiratory protection; failure to conduct fume surveys; failu
to use shielding during arc welding and failure to guard a ch
sprocket. The foregoing citations were subsequently abated b
Cyprus (Tr. 171-179; Ex. R9).

On the day of the inspection 3M badges were placed on

three months was caused in part by the time required to analyze the exposure (Tr. 171, 172, 189, 190; Ex. R9). On August 10, 1982, Citation 2008502 was terminated when it was found that th TLV for mercury complied with the standard (Tr. 184; Ex. R27).

Witness Seale also testified generally converning the meaning of the TLV and TWA for mercury (Tr. 164-167; Ex. R6).

Hamby and Atkins discussed the TLV's. Atkins was always trying to convert the TLV's to parts per million. But there is no relationship between the two (Tr. 282).

After the MSHA inspection Cyprus continued to test for mercury by using 3M badges, sniffer equipment, as well as urine and blood sampling. Hamby discussed rules and practices with employees and instructed them to wear respirators (Tr. 268, 270-273, 285; Ex. R10, R11). The purpose was to address the mercury problem and protect the employees (Tr. 272). On one occasion Atkins was not wearing his respirator and Hamby advise him of the company policy (Tr. 174, 273; Ex. R11).

To alleviate the mercury problem Cyprus also hired D'Appalonea, a mercury clean-up company. They used sulfur dust an industrial vacuum cleaner and sponges to clean-up the ADR in June (Tr. 280; Ex. R12).

In June 1982 Cyprus also ordered a new ventilation system. It was installed in the ADR in August 1982 (Tr. 296).

In a performance report of July 6, 1982, Hamby rated Atkin unsatisfactory in hygiene, safety, housekeeping, willingness to work, dependability, attendance and initiative (Tr. 275, 277; E R13).

Concerning attendance, it was company policy to advise an employee when he had accrued six absences. After missing eight days the employee receives a written warning stating that termi nation is possible on the tenth absence. Atkins was given a written warning on July 8, 1982, for his eighth absence. Atkin refused to sign the notice because of a disagreement over what constituted an excused absence (Tr. 276; Ex. R22).

Atkins' doctor said he couldn't be exposed to chemicals so e couldn't be placed back in the ADR (Tr. 289).

yprus, participated in the decision to fire Atkins (Tr. 299, 01).

According to Appelberg, Atkins requested a transfer to tility from ADR because mercury contamination and ammonia vap re causing him diminished sight in one eye, sinus and nose p lems, as well as inflammation of the lungs (Tr. 301). They h veral conversations regarding the transfer. Dr. Badshah's n ndicated he should not work in a chemical environment (Tr. 30 02, 312). Atkins was unwilling to take a cut in pay. An MSH presentative recommended that Atkins be kept at his present evel of pay (Tr. 301-304).

Atkins worked on the utility crew for three days then he ent back to the ADR for a day shift. He returned to the ADR ecause the Cyprus supervisor in Denver stated Atkins would ha o take an appropriate cut in pay if he remained on utility wo Tr. 303). In the period of July 13th to July 15th Appelberg xpressed his opinion to Atkins that the ADR had not been etermined to be a hazardous place to work. Atkins concern wa o get himself out of the ADR because of the chemical vapors (04, 305).

On July 15, Appelberg advised Atkins in a typed note that Atkins) had been given a physical exam on June 10th by Dr. vens and approved to work in the ADR plant. The note furthe cated that since he continued to refuse to do his assigned wo you leave us no alternative but to terminate your employment" Tr. 305; Ex. R24). Atkins' final options were to go on dis- bility, NIC (Nevada Industrial Commission), or remain as ADR lant foreman. Appelberg indicated it would not be a job relat llness (Tr. 304, 313, 316). Atkins replied something to the ffect of "OK, fire me" (Tr. 305).

At the time of the termination Atkins wrote on the termi- ation notice that he would work in the ADR if the company doc ould examine him and state in a letter that he was physically ble to work in the mill atmosphere (Tr. 305, 306; Ex. R24). is handwritten reply Atkins further referred to the letter of une 30, 1982, and stated that his doctor (Badshah) had found lon colitis and further found that chemicals were aggravatin is condition. In addition, he could not stand the smell of mmonia in the ADR. The ammonia smell and the mercury in the

not advised Atkins to consult outside medical help. Further, he told Atkins that the company would assume no financial obligatio for his self procured medical attention (Tr. 306; Ex. R20).

Dr. Givens, in a telephone conversation, told Appelberg tha he did not find that Atkins had been contaminated by mercury. In addition, Atkins should be able to perform his duties as plan working foreman (Tr. 307).

During conversations between July 1st and 15th Atkins claimed he had miner's rights in that he would not have to take pay cut if he was transferred to utility. An MSHA representativ said the easiest approach was to transfer him to utility at his current pay (Tr. 307, 308). According to Appelberg, Atkins assertion of his miner's rights did not enter into the decision to terminate him (Tr. 308).

Atkins was earning $11.97 an hour as a working foreman compared with $9.33 as a utility worker (Tr. 309, 310).

Appelberg testified that Joseph Legace had worked in the AD for about two months. He filed a workmen's compensation claim alleging mercury contamination. The claim was disallowed (Tr. 310).

Sharon Badger, chief of benefit services for the State of Nevada Industrial Insurance System, indicated the state agency accepted Atkins' claim on September 17, 1982. On that day Atkin was placed on temporary total disability that was back dated to July 9, 1982. Atkins received travel benefits and, in addition, he was paid $8,226.16 ($38.44 a day x 214 days). He was also sent to Parnassus Heights Disability Consultants for a comprehensive integrated workup by medical specialists. The consultants were paid $6,753.23 for their services (Tr. 155-159)

The disability evaluation by the Parnassus Consultants including psychological, neuropsychological and psychiatric examinations, "revealed that the patient's clinical picture warranted a diagnosis of Schizophrenia, Paranoid type. This typ of illness is considered virtually independent of environmental etiology and is, therefor, not industrial in origin." (Ex. R32).

Atkins status under temporary total disability was

Atkins agrees he had some difficulty expressing his medic
ymptoms to the Parnassus doctors. But this difficulty occurr
ecause he had driven directly to San Francisco from Oregon (T
39-141, 149).

Atkins lacks medical or related training but in his opini
is symptoms had to be related to chemicals (Tr. 135, 143).

In the Parnassus report one of the physicians stated that
although the vision became poor after employment, he had not
ought earlier consultation for this problem because of job
hreats" (Tr. 146; Ex. R32, pg. 19). Atkins states he was
hreatened by Hamby over a conversation concerning the manifol
nside the ADR. Hamby also told him to mind his own business
o pickup his pay check (Tr. 146). Hamby stated he didn't lik
he idea of Atkins talking to miners about mercury problems (T
47).

On August 10, 1982, MSHA inspector Seale reinvestigated t
prus plant. The investigation was caused by a letter dated
uly 18, 1982, identified in the exhibit index as an "Atkins t
aser" letter. The letter refers to certain unhealthy
nditions in the ADR. Inspector Seale failed to find any
iolative conditions. Specifically, he found that the alleged
azards did not exist, or it did not present a condition of
mminent danger, or that it was not a violation of the Act or
olation of a mandatory standard (Tr. 180-184; Ex. R26, R27).

Discussion

In order to establish a prima facie case of discriminatio
nder Section 105(c) of the Mine Act, a complaining miner bear
he burden of production and proof to establish that (1) he
ngaged in protected activity, and (2) the adverse action
omplained of was motivated in any part by that activity.
ecretary on behalf of Pasula v. Consolidation Coal Co., 2 FMS
786, 2797-2800 (October 1980), rev'd on other grounds sub nom
onsolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.
981); Secretary on behalf of Robinette v. United Castle Coal
o., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebu
he prima facie case by showing either that no protected activ
ccurred or that the adverse action was not in any part motiva
y protected activit . If an operator cannot rebut the prima

shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 198 Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. 1984)(specifically approving the Commission's Pasula-Robinet test). The Supreme Court has approved the National Labor Re lations Board's virtually identical analysis for discriminat cases arising under the National Labor Relations Act. NLRB Transportation Management Corp., 462 U.S. 393, 397-403 (1983

The vast majority of cases arising under Section 105(c) the Mine Act concern matters of safety. However, the Commis applied the above legal analysis in Rosalie Edwards v. Aaron Mining, Inc., 5 FMSHRC 2035 (1983), a case involving unsanit toilet facilities.

In his post-trial brief Atkins asserts that his request a transfer was a protected activity within the meaning of Se 101(a)(7) of the Act; further, that he had a reasonable good faith belief that the conditions in the ADR plant constitut threat to his safety or health; finally, that Cyprus' termin of Atkins was motivated by Atkins' protected activity.

We will initially consider whether a request for a tran is a protected activity. In this regard Atkins relies on Se 101(a)(7) of the Act which provides as follows:

> (7) Any mandatory health or safety standard promulga under this subsection shall prescribe the use of lab or other appropriate forms of warning as are necessa to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and approp emergency treatment, and proper conditions and pre- cautions safe use or exposure. Where appropriate, s mandatory standard shall also prescribe suitable pro tective equipment and control or technological proce to be used in connection with such hazards and shall vide for monitoring or measuring miner exposure at s locations and intervals, and in such manner so as to assure the maximum protection of miners. In additio where appropriate, any such mandatory standard shall scribe the type and frequency of medical examination other tests which shall be made available, by the operator at his cost, to miners exposed to such haza in order to most effectively determine whether the h

suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed fr such exposure and reassigned. Any miner transferred as result of such exposure shall continue to receive compensation for such work at no less than the regular rat of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. In the event such medical examinations are in the nature of research as determined by the Secretary of Health, Education, an Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education and Welfare The results of examinations or tests made pursuant to the preceding sentence shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the miner, to his designated physician.

Atkins' particularly relies on the underlined portion of Section 101(a)(7).

Atkins states there has not been any standard published pursuant to Section 101(a)(7). However, he argues that the only applicable standard in this factual situation is the threshold limit value (TLV) for mercury adopted in 1973 by the American Conference of Governmental Industrial Hygienists as contained in 30 C.F.R. § 55.5-1 (now recodified at 30 C.F.R. 56.5001).

Atkins has misconstrued the scope of the Mine Act. By its very terms under § 105(c) the miners particularly protected are those miner's that are the subject of medical evaluations and potential transfer under a standard published pursuant to Sectic 101. There are no medical evaluations or potential transfers no contemplated within the terms of the TLV for mercury, 30 C.F.R. § 56.5001. Accordingly, the above regulation cannot be held applicable.

The Commission recently ruled that a miner may state a caus of action under Section 105(c)(1) if he is the subject of medica evaluations and potential transfers under such a stan ard

clusion is urged on the basis of certain facts:

First, coworkers Legace and Bowers had been diagnosed as having mercury poisoning in the Cyprus refinery. Further, Lega had described his symptoms in detail to Atkins.

Secondly, Atkins' quantitative urinalysis, taken at Legace suggestion, revealed a level of 65 mcg/24 hours. Atkins was alarmed because 0-20 mcg/24 hours is considered normal but 65 m is still within the state's guidelines.

Thirdly, Atkins knew the atmospheric conditions in the ADR violated the MSHA TLV standards for mercury. Atkins had been with the MSHA inspectors when he monitored the mercury levels i the ADR. Atkins had seen the mercury in the tanks. He also kn the citations issued by Inspector Seale were not posted by Cyprus, hence, he knew the company was not being candid with it employees.

Fourth, Atkins' family doctor, Dr. Badshah, examined and treated him for his headaches, sinus and breathing problems, gastroenteropathy and spastic colon. Dr. Badshah told Atkins h thought the health problems were related to exposure to mercury vapor in the Cyprus mine. Dr. Badshah subsequently wrote a not for the plant manager, Jim Leveaux. Atkins then based his request for transfer to the utility crew on Dr. Badshah's advic

Atkins' claim lacks merit. The first four incidents he relies on occurred several months before he was terminated. Specifically, the Legace/Bowers conversations took place in Apr 1982. The quantitative urinalysis was in the same month. The TLV excursion for mercury was in May 1982. The Badshah medical reports relate to previous alleged exposures.

Atkins certainly may have had a reasonable basis of concer for his health. But the pivitol issue is whether he had a reasonable good faith belief that the work he refused to do on July 15, 1982, was hazardous to his health at or about that tim Bush v. Union Carbide, 5 FMSHRC 993 (1983).

A careful study of the record causes me to conclude that n credible evidence supports Atkins' reasonable belief that the A was hazardous on or about July 15, 1982.

02-204).

When he was asked about the conditions in the ADR on July 5, 1982, Atkins said that he "believed the levels were close cceptable." Further, the ADR "could have been perfectly safe hat time" (Tr. 108, 109).

Finally, Dr. Badshah's note of July 9, 1982, written for tkins, addresses his physical conditions. It does not establ he conditions in the ADR at or about mid-July.

On his termination notice (Ex. C21, R24) Atkins wrote tha would work in the ADR if the company doctor said he was phy lly able to work in the mill atmosphere. His stated reason hat he could not stand the smell of ammonia. In addition, he sserts the ammonia and the merc (mercury) had not been correc Ex. R24).

I do not find the statements concerning the mercury to be edible. At the hearing, when speaking of Exhibit R24, Atkin ated "[t]he mercury was not a problem" (Tr. 112, 113).

For the foregoing reasons Atkins refusal to work was not rotected activity.

Cyprus at all times asserted that the ADR was a safe plac o work at or about July 15th. But, since Atkins was not enga an activity protected by the Act, it is not necessary to ex nine respondent's evidence.

Briefs

Counsel have filed detailed briefs which have been most elpful in analyzing the record and defining the issues. I ha eviewed and considered these excellent briefs, However, to t xtent they are inconsistent with this decision, they are re- ected.

Conclusions of Law

Based on the entire record and the factual findings made he narrative portion of this decision, I enter the following onclusions of law:

Based on the foregoing facts and conclusions of law, I enter the following order:

The Complaint of discrimination filed herein is dismissed.

John J. Morris
Administrative Law Judge

Distribution:

Mary Gray Holt, Esq., Jolles, Sokol & Bernstein, 721 Southwest Oak Street, Portland, OR 97205 (Certified Mail)

John F. Murtha, Esq., Woodburn, Wedge, Blakey & Jeppsen, One East First Street, Reno NV 89505 (Certified Mail)

/blc